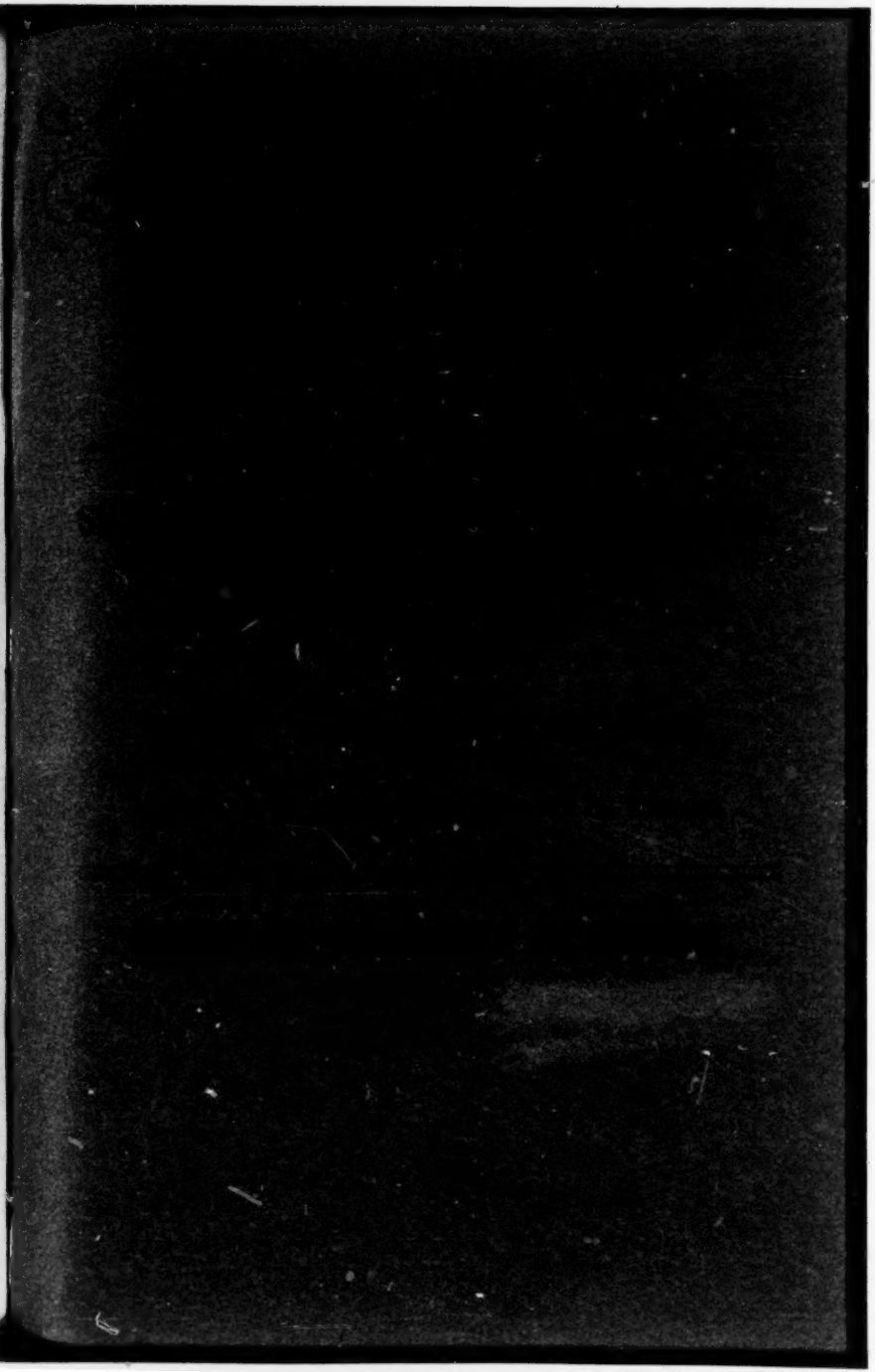


SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 216.

HENRY P. CLARKE, PLAINTIFF IN ERROR,

vs.

NANCY B. CLARKE, DEFENDANT IN ERROR.

STATEMENT.

Henry P. Clarke, the plaintiff in error in this cause, "as executor of the last will and testament of Julia H. Clarke, deceased, and trustee of the estate of Nancy B. Clarke, his infant daughter," under said will brought suit against Nancy B. Clarke, the defendant herein, in the Circuit Court for the Fifth Judicial Circuit of South Carolina, praying for "the judgment and direction of the Court in regard to the true construction of said will, and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will, in the premises, and for such further relief as may be just and proper." (Transcript of record, page 14; finding of fact, 13.) A guardian *ad litem* was appointed for the said infant defendant, who duly answered, and, after hearing had, the said Court "ordered, adjudged and decreed, that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty, at the time of her death, of all her real estate, of whatsoever description, and wheresoever situated, and that the plaintiff, as executor, receive, administer and account for the same, as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree." (Transcript of record, pages 14 and 15; finding of fact, 13.)

This judgment was, upon appeal, subsequently affirmed by the Court of last resort in South Carolina, as will appear by reference to the report thereof, in 46 So. Ca., 230—which, in the finding of facts, page 15, finding 14, is a part of the record.

By the law of the State of South Carolina, the Court in which

the said action was brought, mentioned in said finding of fact, 13, had jurisdiction both of the persons and subject matter of that suit, and by a like law the plaintiff in error shared equally with the defendant, his surviving child, in the distribution of the estate of his deceased daughter, Julia Clarke, who died after the death of her mother, on the 20th of May, 1894. Henry P. Clarke and his daughter, Nancy B. Clarke, were the only heirs at law of the infant, Julia Clarke, under the laws of South Carolina.

On the 1st day of February, 1897, after the filing of said decree and its confirmation by the Supreme Court of South Carolina, the said Henry P. Clarke became the administrator of the estate of said infant, Julia Clarke, who was at the time of her death domiciled in South Carolina, and her estate has ever since that date been in process of settlement in the proper Court of that State.

That thereafter the said Henry P. Clarke was granted letters of administration of the estate of said Julia Clarke by the Probate Court for the District of Bridgeport, in the State of Connecticut, ancillary to those granted to him of said estate in South Carolina. He thereupon filed his petition in said Court to ascertain to whom said estate should be distributed, to which cause Nancy B. Clarke and Henry P. Clarke were made parties by due notice, and were duly represented at the hearing thereof.

Upon such hearing, the said Probate Court found that the intestate was domiciled in the State of South Carolina at the time of her decease; that the entire inventoried assets of her estate in this State consists of an undivided interest in certain real estate, situated in the town of Bridgeport, of the value of $, which said interest was derived from the will of her mother, Julia H. Clarke, who died about four months prior to the decease of the intestate, domiciled in the State of South Carolina, an exemplified copy of whose will "and the decision of the Supreme Court of South Carolina interpreting the same, in a case in which the petitioner herein was plaintiff, and Nancy B. Clarke was defendant, is on file and of record in this Court, and hereby referred to, and whose estate is yet unsettled and undistributed."

"Wherefore, this Court finds and decrees that the sole heir and distributee is her aforesaid sister, Nancy B. Clarke." (Transcript of record, pages 7 and 8, folio 20.)

From this order Henry P. Clarke duly appealed to the Superior Court in and for the County of Fairfield, in the State of Connecticut, upon the following grounds:

1. That he is the father and surviving parent of the said Julia Clarke, deceased.

2. That he is the heir at law and distributee of the said Julia Clarke, deceased.

3. That he is aggrieved by the order and decree of this Court, made on the 3d day of July, A. D. 1897, as by said decree on file

more fully appears, declaring one Nancy B. Clarke, of said city of Columbia, to be the sole heir and distributee of the estate of the said Julia Clarke, deceased. (Transcript of record, page 8.)

The said Henry P. Clarke's reasons for appeal from said Probate to said Superior Court, are:

I.

1. The estate of the intestate in the State of Connecticut consisted of property, all of which is for purposes of distribution, and for the purposes of the ascertainment of the heirs and distributees, personal estate.

2. The intestate was, at the time of her death, domiciled in the State of South Carolina, and her estate has ever since the first day of February, 1897, been in due process of settlement in the proper Courts of that State.

II.

1. The Court erred in assuming to ascertain the heirs and distributees of the intestate, as all of the estate of the intestate for the purpose of the hearing then before the Court, consisted of personal property, and the Courts of South Carolina alone had jurisdiction to fix and ascertain the heirs and distributees.

III.

1. The Court erred in not dismissing the petition for want of jurisdiction to grant the relief prayed for in the application. (Transcript of record, pages 12 and 15.)

Paragraph one of the first reason of appeal was denied by the defendant, Nancy B. Clarke; paragraphs two and three are admitted by her, and the second and third reasons of appeal are denied. The finding of fact, the reservation of the case by the said Superior Court for the consideration, advice and judgment of the Supreme Court of Errors of the State of Connecticut will be found upon pages 13 to 18 of the transcript of record. The Court filed its decision on 5th day of January, 1898, in which it affirmed the decree of the Court of Probate.

The plaintiff in error makes the following assignment of errors, which he avers occurred in the final judgment of the Supreme Court of Errors of the State of Connecticut, April term, 1898, herein: That error was committed in deciding against the right specially set up and claimed by him under art. 4, sec. 1, Constitution of the United States, in this, that full faith and credit were not given to the judicial proceedings of the State of South Carolina, to wit: to the judgment of the Court of Common Pleas for Richland County, South Carolina, and the judgment of the Supreme Court of the State of South Carolina, of March 18, 1896, affirming the same in the case of Henry P. Clarke, as execu-

tor of the last will and testament of Julia H. Clarke, and trustee of the estate of Nancy B. Clarke, under said will, against Nancy B. Clarke, ordering, adjudging and decreeing that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty, at the time of her death, of all her real estate of whatsoever description, and wheresoever situated, and that Henry P. Clarke, as executor, receive, administer and account for the same as personalty; and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree; and deciding, on the contrary, that the will of said Julia H. Clarke did not work an equitable conversion into personalty, at the time of her death, of the real estate of the said Julia H. Clarke, situate in the State of Connecticut; and that the said Nancy B. Clarke, defendant in error, was sole heir of a certain undivided interest of the real estate of the said Julia H. Clarke, in the State of Connecticut, which interest passed as real estate under her said will.

In the decree of Judge Baldwin, of the Supreme Court of Errors of Connecticut, he says, that, if the true construction of the will of Julia H. Clarke is, that said will works an equitable conversion of all the real estate of the testatrix, wherever situated, the decree of the Court of Probate for the District of Bridgeport, from which the present appeal was taken, was erroneous.

He then holds that the South Carolina decree was not conclusive on the defendant, Nancy B. Clarke.

1st. Because the parties to the judgment in South Carolina were not the same as those to the proceedings in the said Probate Court, and because the subject matter of the two causes are not the same; and then proceeds to a discussion of the subject of equitable conversion, as a new question, without respect to, or without giving full faith and credit to, the South Carolina judgment, which had held that the will of Mrs. Clarke worked an equitable conversion of her real estate into personalty, and concludes that said will did not work an equitable conversion of said realty into personalty.

The questions thus raised for the consideration of this Court are: 1st, are the parties to the said causes the same; 2d, is the subject matter of the two causes the same; and 3d, did the South Carolina Courts have jurisdiction of the subject matter of the said causes?

I propose to discuss these questions in the order thus stated.

The object of the proceedings by the administrator in the Probate Court of Bridgeport, Connecticut, was to administer the estate of Julia Clarke, which consisted, in fact, in an undivided share of real estate under the will of her mother, which the Courts of South Carolina had held was, by the terms of said will, converted into personalty; and which, under the statute laws of

South Carolina, the domicile of H. P. Clarke and Nancy B. Clarke, was to be divided equally between them.

In this proceeding in the said Probate Court of Bridgeport, Connecticut, the said will and the decree of the South Carolina Courts and the proceedings therein, were introduced, received in evidence, and considered by the said Probate Court. If the said will worked an equitable conversion of the real estate of Mrs. Clarke into personalty, then it was distributable under the laws of her domicile, and the only proper parties to that proceeding were the administrator, and Henry P. Clarke and Nancy B. Clarke, to whom it descended, under the laws of the domicile of Mrs. Clarke.

The Probate Judge, however, did not respect the construction of said will by the South Carolina Courts, and treated said estate of Julia Clarke as realty, which, under the laws of Connecticut, descended to Nancy B. Clarke, as the sole heir at law of Julia Clarke. In the South Carolina decree, the nominal parties were Henry P. Clarke, as executor, Henry P. Clarke, as trustee under said will of the estate of Nancy B. Clarke, and Nancy B. Clarke. To the proceeding in the Probate Court of Connecticut, the nominal parties were Henry P. Clarke, as administrator, Henry P. Clarke and Nancy B. Clarke.

Were not these parties really and substantially the same in both proceedings? We contend that they were. The South Carolina case was brought by Henry P. Clarke, as executor and as trustee, under the said will of Mrs. Julia H. Clarke. Henry P. Clarke was a legatee and devisee, and the trustee of the estate of Nancy B. Clarke and Julia Clarke under said will, and where a person occupies a representative capacity, and has a personal interest under the instrument giving him the representative character, he is bound by a judgment to which he was a party in either capacity. In the case of *Manigault* vs. *Deas*, Bailey's Equity S. C., pages 273 288 and 289, it is held that a decree in a suit brought by an executrix, in her own right, but to which she was a necessary party, as executrix, and in which the rights of her testator were adjudicated, is conclusive between the administrator, *de bonis non*, with the will annexed, of said testator, and the other parties to it, and cannot be re-examined in a subsequent suit between them.

In this case, the plaintiff, Mrs. Deas, brought an action against the Bank of the State of South Carolina to restrain the bank from selling, under a mortgage, given by Deas, her husband, and of whose estate she was executrix, thirty-six slaves, which she claimed came to her from the estate of her father. The said bank, in its answer, claimed that the marital rights of Mrs. Deas' husband attached to said slaves, and that he could, therefore, mortgage them. The Court held that, under the will of the father of Mrs. Deas, she only had a life estate, and that her husband, of

whose will she was executrix, could only mortgage this life estate to the bank.

Afterwards, the executors of one Manigault filed a bill in the Court of Equity against the said Mrs. Deas, as the executrix of David Deas, for the account of the assets of his estate, and she was also required by the complaint to account for the slaves held by her under her father's will, as part of the assets of her husband's estate. To this last action the said bank was also a party. The Court of Appeals of South Carolina held that, under her father's will, Mrs. Deas took an absolute estate in the slaves bequeathed to her; and that, by the marital rights of her husband, they had vested in him, and ordered the slaves sold for the debts of her husband, her testator. It also held, in this last case, that the said bank being a party to the former suit, was bound thereby, and could not share with the other creditors in the fruits of the last cause.

Judge O'Neal, in discussing the parties to the first case, says: "This is conclusive that she stood before the Court in the two-fold character of legatee under Humphrey Summer's will, and executrix of David Deas." It is not essential, says Mr. Starkie, in his Treatise on Evidence, vol. 1, page 194, "that either the parties or the form of action should be precisely the same, if they are substantially the same." And again, "so a record is evidence against one who might have been a party to it, for he cannot complain of the want of those advantages which he has voluntarily renounced." *Id.*, 194.

Mrs. Deas, as executrix, could not have questioned that decree against the bank, for in substance, if not in form, she was a party to it; and if she could not have questioned it, it follows that the bank could not have objected to it, as evidence in her favor.

In the case of *Small* vs. *Small*, 16 South Carolina, page 64, it is also held that where executors are sued in their representative capacity, that their individual interest in the property in litigation could be sold by the judgment against them as executors, they being legatees and devisees under the will of which they were the qualified executors.

In 53 South Carolina, page 318, *Verner and others* vs. *Bookman and others*, it is held that a judgment against an administrator, entered in book of abstracts of judgment in the office of the Clerk of the Court of Common Pleas, ascertaining and directing the payment of a final balance, in a suit for an accounting, is a judgment against the administrator individually. In the South Carolina Courts, Henry P. Clarke, as an individual, could never be heard or allowed to question the decree in a cause which he had brought as executor for the construction of a will under which he was a large beneficiary. He was before the Court in the said cause for the construction of his wife's will in a two-fold character, as executor and a beneficiary under said will, seeking the ad-

vice of the Court, and its interpretation of said will and his authority thereunder, and an attempt upon his part to act otherwise than directed by said Court would be trifling with justice.

In the South Carolina case, every possible interest was represented. H. P. Clarke was there as executor and trustee, and as a beneficiary under said will. In this two-fold capacity the whole suit was conducted by him, and resulted in a decree to his individual interest, in that the Court held that Mrs. Clarke's will worked an equitable conversion of her whole real estate into personalty, and if personalty, it was distributable under the law of the domicil, where he took an equal share with Nancy B. Clarke in Julia Clarke's estate, which was a part of Julia H. Clarke's estate. His personal interest being thus adjudged under this case, which he brought as executor, for the construction of said will, he could not be heard against said construction in any jurisdiction to the contrary thereof. He was not only before the Court as a beneficiary under the will of Mrs. Clarke, but also as a distributee at law of the estate of Julia Clarke, which consisted, under the said will, of an undivided one-third interest of Mrs. Julia H. Clarke's estate, which Henry P. Clarke held under the terms of said will as trustee. He being, therefore, the heir at law of Julia Clarke, was before the Court in this capacity, when he sued as executor and trustee, because the object of that suit was, to whom should he, as executor and trustee, account for the estate in his hands, after he had been advised as to what was the true character of that estate, under the terms of Mrs. Clarke's will. He and his daughter, Nancy B. Clarke, being the only heirs and distributees at law, under the South Carolina law, there was no necessity for an administrator of the estate of Julia Clarke in that cause, she having died an infant only four months old, and owing no debts.

In South Carolina, a bill for the distribution of an infant's estate may proceed without making an administrator of the infant a party. *Markley* vs. *Singletary*, 11 Rich. Eq. S. C., 393.

The reasons for this are plain: 1st, the infant owed no debts, and there was no use for an administrator; and, 2d, the property descended to the distributees and heirs at law, who were parties to the said cause.

The said South Carolina decree being, therefore, conclusive and binding on Mr. Clarke, as beneficiary under said will, and as one of the heirs at law of the undivided interest of Julia Clarke's share in said estate of which he was executor and trustee, in the South Carolina Courts, he is bound by that decision in every other jurisdiction where the subject matter of that cause is brought up again for adjudication between the same parties.

Where the judgment is conclusive between the parties in the State where it was rendered, it is equally so in every other State

and Court in the United States, 5 Wall., page 290, *Christmas* vs. *Russell.*

In this same case, it is said: "Indeed, the Court in effect say that the rule is undeniable that the judgment or decree of a Court possessing competent jurisdiction is final, not only as to the subject thereby determined, but as to every other matter which the parties might have litigated in the cause and which they might have decided. Same rule prevails in the Courts of New Hampshire, Rhode Island and Connecticut and most other States."

But Mr. Clarke is not only bound individually by the law of South Carolina, but by the universal rules of practice of the Courts of Chancery or Equity everywhere.

In Starkie on Evidence, page 331, it is said: "A record is also evidence against one who might have been a party to it, for he cannot complain of the want of those advantages which he has voluntarily renounced." Again, at page 334, "No one in general can be bound by a verdict or judgment, unless he be a party to the suit, or he be in privy with the party, *or possess the power* of *making himself a party.*"

In *Morton* vs. *Packwood,* 3 Annual Louisiana Reports, page 173, Chief Justice Eustis says: "We do not consider that it is at all material that the appearance and acts of the defendant were in his capacity of executor. His personal rights were asserted and determined upon. Had he been adjudged to account for the plaintiff's interest in the plantation and slaves, to restore it to the community, with its revenues, the judgment would have bound him, and could have been enforced against him. Being once a party to the record, it would have been a vain form to require him to appear personally against himself. Rather than to require such a thing, the law authorizes him to assert, at will, his personal rights in his representative capacity. We apprehend that such is the usage observed in the settlement of successions, under the directions of the Courts of Chancery. Where an executor is called upon to account, and he is a creditor, or an heir, or has claims on the property in his charge, and asserts those claims, and, on adjudication, they are maintained after litigation, in relation to them by competent parties, we are not aware that the judgment rendered can afterwards be drawn in question, on the ground of the representative capacity in which he asserted his rights. On this point, we have not been furnished with any authority from that system of jurisprudence, with which one of the learned counsel, Mr. Printiss, who argued this cause, is so familiar."

In *Denegre* vs. *Denegre,* 33 Louisiana Annual Reports, page 689, it is decided that an executrix who is also the widow in community of the testator, being sued in the former capacity only, but raising in her defense of the suit the issue of her rights, as usufructuary, will be personally concluded by the judgment, and

cannot afterwards attack its validity on the ground that she is not cited in her individual capacity.

In *Fouche, assignee, et al.,* vs. *Harrison, executor, et al.,* 78 Ga., page 410, Judge Bleckley, C. J., says: "We propose now to dispose, as briefly as possible, of the main case, in doing which, we shall rule principles rather than mere points. It is contended that when an executor files a bill as executor, he commits himself to nothing in his personal and individual character, that he is not a party otherwise than as representing the estate, and that pending the bill, he may act as freely, touching any individual right, or interest, involved, as if some other person were the complainant. To this doctrine we are quite unable to assent. On the contrary, as we understand the law, an executor who files a bill in his representative capacity is a party thereto in his individual capacity, if as an individual he has a manifest interest in the subject matter of the bill. Thus an executor being a legatee to the extent of the net income of the whole estate during his life, and to the extent of one-fourth of the general residuum, having filed a bill, as executor, to restrain some of his creditors from proceeding to subject his interest by levy and sale at law, to which bill creditors of the estate as well as some of his own creditors are parties defendant, and praying for a decree directing him, in view of the conflicting claims of the defendant, how to administer the estate of his testatrix, and that the defendants establish their priorities, and show to what extent they can legally subject assets of the estate to the payment of their claims, is a party complainant, not only as executor, but likewise as legatee and debtor. Can it be supposed that the decree on such a bill would not bind him individually in respect to his legacies, or that as an individual he would not be entitled to take the benefit of the decree, in so far as it might redound to his individual interest touching those legacies? Moreover, is it not as much for the protection of the executor as for the advantage of the estate, and often more so, that a Court of Equity interposes to give direction? Whoever heard that an executor has to make himself a party to his own bill, in order to bind himself individually, or to give himself, as a creditor, legatee or otherwise, the fruits of the decree to the extent of his personal interest in the same. Is it possible to doubt that on the present bill it would be competent to decree the proper disposition to be made of the legacies, whether to pay them out of the claims of creditors, or to hold them free from such claims? And how could the executor as an individual, either share the burden or be shorn of the benefit of any rightful share on that subject, that might be rendered? Unless we are wholly unfit to be judges on such a question, we are at a loss to understand why it should be considered a question at all. That no direct authority upon it has been produced, must be due alone to the fact that legal evolution has not

progressed far enough to develop a needless precedent for a necessary conclusion."

The following cases are also authority upon the same subject:

Donifelser vs. *Heyl*, 52 Pacific Reporter, page 468.

Colton vs. *Onderdonk*, 69 California, 155, and 10 Pacific Reporter, 395.

Stewart vs. *Montgomery*, 23 Pa. St. Report, 410.

Small vs. *Flint*, 10 Mass., 128.

Kerrison vs. *Stewart*, 93 U. S., 155.

Corcoran vs. *Chesapeake and Ohio Canal Co.*, 94 U. S., 741.

In this last case it is said: "It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds and coupons, and in this latter capacity is not bound by that decree. But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds and coupons, he is bound, because he was representing himself. If he has bought them since, he is bound as privy to the person who was represented. *Kerrison, assignee*, vs. *Stewart*, 93 U. S., 155, and the authorities there cited."

This being the law of the case, the parties to the two suits in South Carolina and Connecticut were the same. H. P. Clarke, as executor and trustee, brought the suit in South Carolina, and as executor he represented his own personal inetrest, as beneficiary under said will, and as heir at law of Julia Clarke's share of Julia H. Clarke's estate, and is, therefore, bound in all Courts of the United States by the judgment rendered in that case, when again questioned by the same parties.

In the Connecticut case, he was before the Courts as administrator, and as heir at law of Julia Clarke's estate, and at the same time he was executor of Julia H. Clarke's will and estate, the trustee of the shares of his infant daughters, Nancy B. Clarke and Julia Clarke, all of which appears from the transcript of record, pages 13 to 17, folios 28 to 33.

In his appearance in the case of the Probate Court of Bridgeport, Conn., as an individual, he set up the judgment and proceedings in the South Carolina Courts, in which he appears as executor and trustee, in evidence as *record evidence*, and conclusive of his own rights as an individual and those of his daughter. He here recognizes the fact that he is bound by that judgment, and avails himself of one of the ways directed by law of establishing his rights adjudicated by that judgment, to wit: placing it in evidence as *record evidence* of those rights. He could have set up

the judgment in his answer, but placing it in evidence was as effectual as if he had pleaded it in his answer; and it appearing thus in evidence, the Probate Court was bound to give it full faith and credit, and in not doing so, he has violated the fundamental law of the United States, which requires full faith and credit to be given such judgments.

2d. Was the subject matter of the two suits the same, and did the South Carolina Courts have jurisdiction of the parties and subject matter of the suit brought there, for the construction and interpretation of Mrs. Julia H. Clarke's will?

Judge Baldwin, of the Supreme Court of Errors of Connecticut, in his decree in the case, page 19, transcript of record, says: "This will (that of Mrs. Julia H. Clarke) was admitted to probate in the proper Courts of that State (South Carolina), and a suit for its construction afterwards brought there before a Court of Equity having jurisdiction of the parties and the subject matter, which resulted in the decree to the effect that it worked an equitable conversion of all the real estate of the testatrix wherever situated. If this be the construction of the will, the decree of the Court of Probate for the District of Bridgeport, from which the present appeal is taken, is erroneous."

He here concedes that the Courts of South Carolina had jurisdiction of the subject matter of that suit, but contends that the parties to the Bridgeport, Connecticut, suit were not the same as those to the South Carolina suit, and that the subject matter of the Connecticut case was not the same as that of the South Carolina case. The only question which the South Carolina suit adjudicated was whether or not there was an equitable conversion of Mrs. Clarke's real estate, by her will, at the time of her death into personalty. This was the sole question considered by that Court, and the sole question decided by it. H. P. Clarke's complaint was framed and all the pleadings made to fix the determination of that question.

The petition, evidence and proceedings of the administrator, H. P. Clarke, in the Probate Court of Bridgeport, proceeded upon the assumption that the estate of Julia Clarke, which was an undivided third interest in Julia H. Clarke's estate, coming to her under the will of her mother, Julia H. Clarke, was personalty, as had been determined and adjudged by the South Carolina decree. Julia Clarke, the infant, owed no debts, and there was no use for an administrator, except for transmitting the fund to the South Carolina jurisdiction for settlement in the proper Courts of that State.

The whole contention, then, in the Probate Court of Bridgeport, was whether that estate was personalty, and whether the will of Mrs. Julia H. Clarke had made it personalty. This question had to be determined before the question to whom it should be distributed could be decided. If that estate was personalty, then,

as Judge Baldwin says, the decree of the Probate Court was erroneous. In the Judge of Probate's decision, he says that an exemplified copy of Mrs. Clarke's will and "the decision of the Supreme Court of South Carolina interpreting the same, in a case in which the petitioner herein was plaintiff, and Nancy B. Clarke was defendant, is on file in this office, and is hereby referred to." And then he adds: "Wherefore, this Court finds and decrees that the sole heir and distributee of the intestate is her aforesaid sister, Nancy B. Clarke." How could the Probate Court have reached this decision, except it had held that the estate of Julia Clarke, under her mother's will, was real estate and not personalty; and, therefore, Julia Clarke's only heir was her sister, Nancy B. Clarke, to whom her estate descended, under the statute law of Connecticut. If that estate was personal property, it was governed by the law of the domicil of the intestate, South Carolina, and distributable according to the statute law of that State; in which case Henry P. Clarke and Nancy B. Clarke were the heirs at law. The sole question, therefore, which that Court determined, in reaching the conclusion that Nancy B. Clarke was the sole heir at law of Julia Clarke, was that Julia's estate was not personalty, but realty. Was it real or personal property, was the question decided. This was the precise question in South Carolina—was Julia Clarke's estate, consisting solely of an undivided one-third interest in her mother's estate, personalty or realty? That question was before the South Carolina Court in the construction of Mrs. Clarke's will, and was the same that the Probate Court passed upon in reaching its conclusion. Again, the issues raised by the reply to the reasons of appeal, page 13 of the transcript of record, is as to whether Julia Clarke's estate is personal or real estate. Paragraph one of the first reason of appeal is as follows: "1. The estate of the intestate in the State of Connecticut consisted of property, all of which is for the purpose of distribution, and for the purpose of the ascertainment of heirs and distributees, personal estate." And paragraph one of the second reason of appeal is: "1. The Court erred in assuming to ascertain the heirs and distributees of the intestate, as all of the estate of the intestate, for the purpose of the hearing them before the Court, consisted of personal property, and the Courts of South Carolina alone had jurisdiction to fix and ascertain the heirs and distributees."

The reply of the defendant, Nancy B. Clarke, to these reasons of appeal denies the above. The issue thus raised was as to whether Julia Clarke's estate was personalty or not. Again, the questions of law which arise upon the findings of fact by the Superior Court is the same which was raised by the reasons of appeal of H. P. Clarke, and the reply thereto by Nancy B. Clarke.

Again, the Supreme Court of Errors of Connecticut, after holding that the parties and subject matter of the two suits were not the same, proceeds to pass upon the question of the character of

Mrs. Clarke's estate, and holds that said will did not work an equitable conversion of all the real estate into personalty, and for this reason, and this alone, affirms the decree of the Probate Court. Judge Baldwin, page 22, folio 43, of transcript of record, says the decree of that Court (meaning the Probate Court of Bridgeport), from which this appeal is taken, treated the real estate in this State left by Julia Clarke as being real estate, to all intents and purposes. If, in truth, it had become before her death the subject of an equitable conversion, this decree must be reversed, and the reasons of appeal have brought this point directly before the Superior Court for decision. If the question of equitable conversion is taken out of the decree of the Probate Court, the findings of fact and reservation of the Superior Court, and the decree of the Supreme Court of Errors of the State of Connecticut, then the whole proceeding becomes a lifeless skeleton, without nerve and sinew, without flesh and blood, and there was no subject matter considered by that Court.

He then proceeds to discuss the question of equitable conversion, because it was raised by the reasons of appeal from the Probate Court to the Superior Court, which Court, in its finding of fact and reservation, submitted this question *as the question* upon which the judgment of the Supreme Court was asked. This question was thus, not only the sole question before the Probate Court and Superior Court, but the main question before the Supreme Court of Errors. Judge Perry, guardian *ad litem* and attorney for the infant defendant, Nancy B. Clarke, says in his argument before the Court: "The only question in this case is whether certain estate of Julia Clarke, situated in Connecticut, is, for the purpose of distribution, real estate or personal property." If this is true, how could the subject matter of the two suits be different? They were concerned about the same matter.

It is contended, however, that the South Carolina Court had no power or jurisdiction to determine the question submitted to it, so as to affect Connecticut lands, and, therefore, the judgment was not binding on Nancy B. Clarke or H. P. Clarke.

It must be borne in mind, in the discussion of this question, that Mrs. Julia H. Clarke's will was executed according to the forms of law prescribed by the State of Connecticut for the execution of wills. Her will was properly executed, and being such, regulated the disposition of her estate, and that will becomes the law of this case.

The question of construction of the will is an entirely different one from that of its execution. If it had not been executed according to the forms of law prescribed by the State of Connecticut in the disposition of property, then the question might properly arise as to whether the *lex rei sitæ* did not govern in the disposition of real estate. But that question does not here arise. The will has all the requisites as to form and execution prescribed

by the laws of Connecticut, and the only question that the South Carolina Court undertook to decide was what did the will mean, what was its proper construction, and what power and authority did it give the executor.

The will being the will of a South Carolinian, and all the beneficiaries under the residuary clause being domiciled in that State, we submit that the Courts of that State, which assumed jurisdiction, had jurisdiction of the parties, and the question as to meaning of that will, although it indirectly affected lands outside of that State.

In *Massie* vs. *Watts*, 6th Cranch, page 160, Chief Justice Marshall uses the following language: "Upon the authority of these cases, and others, which are found in the book, as well as upon general principles, this Court is of opinion, that in a case of fraud, of trusts or of contract, the jurisdiction of a Court of Equity is sustainable wherever the persons be found, although land not within the jurisdiction be affected by the decree." He also says, in the same case: "The strict primary decree of a Court of Equity is *in personam*, and may be enforced in all cases where the person is within its jurisdiction."

In *Earle of Kildare* vs. *Sir Morrice Eustace and Fitzgerald*, 1 Vernon, 419, it was determined that if the trustee live in England, the Chancellor may enforce the trust, although lands lie in Ireland.

In *Toller* vs. *Carteret*, 2 Vern., 494, a bill was sustained for the foreclosure of a mortgage of lands lying out of the jurisdiction of the Court, the person of the mortgagor being within it.

In the case of *Penn* vs. *Lord Baltimore*, 1 Vez., page 444, Lord Chancellor Hardwicke held that a contract relating to lands lying in Pennsylvania and Maryland, could be construed by the Chancery Courts in England, because it had jurisdiction of the parties, both resident and citizen of England, and the subject matter, to wit: The construction of English contract relating to Maryland and Pennsylvania lands, and could, therefore, reach the persons of the parties, and being a judgment *in personam*, was binding upon them, though that which it effected was in another territory.

In the case of *Burnley* vs. *Stevenson*, 24 Ohio St. Reports, page 474, the rule is laid down, that the decree was *in personam*, and bound the consciences of those against whom it was rendered. In it the contract of their ancestors to make the conveyance was merged. The fact that the title which had descended to them for Evans was thus established by the decree of a Court of competent jurisdiction. Such a decree is *record evidence* of that fact, and also of the fact that it became and was their duty to convey to him the legal title. In this case a decree of a sister State had held that, under a contract of the ancestor of one of the parties, it had been stipulated that the ancestor would convey certain lands in another State to one Evans. This Court having

jurisdiction of the parties, held that the parties to whom the legal title had descended were bound, under that contract, which they found to be good, to convey to Evans the lands which their ancestor had contracted to sell to him, and so decreed, although the lands were in the State of Ohio, and beyond the jurisdiction of the State where the contract was made and the parties resided and had their domicil.

Again, it has been held that a suit for specific performance of a contract for the conveyance of lands proceeds *in personam*, and may be maintained in any Court of Equity which has jurisdiction of the parties, even if the land lies in another State or foreign country. *Brown* vs. *Desmond*, 100 Mass., page 269.

In the case of *Ford* vs. *Ford*, 70 Wisconsin, page 19, it is laid down that the *validity* of a will of real estate must be governed by the law of the place where the land is situated, and that the *validity* of a will of personalty must be governed by the law of the testator's domicil, and that the law of the domicil governs in the *interpretation* of wills. Story on Conflict of Laws, sec. 479a and 479c; *Van Steenwyck* vs. *Washburn*, 59 Wis., 510. In the words of Mr. Justice Story: "The language of wills is not of universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator according to the received laws and usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or contradicts such a conclusion." *Harrison* vs. *Nixon*, 9 Pet., 404; *Trotter* vs. *Trotter*, 4 Bligh (U. S.), 502; *Chamberlain* vs. *Napier*, L. R., 15 Ch. Div., 614.

In *Caruthers and wife* vs. *Corbin, ex'ors, and others*, 38 Ga., page 86, it is said: "We fully recognize the rule here contended for, that this Court will not enforce the laws of another State which contravene the policy of our laws; but this case does not fall within this rule. Here a will was made in South Carolina, which according to the decision of the highest tribunal known to the laws of that State, confirmed certain rights on certain parties, irrespective of the provisions which, in our Courts, would render the will illegal. We are not called upon to enforce any illegal provisions of the will. The question of emancipation is not in any way before us. Here is a judgment of our sister State by a Court having jurisdiction of the parties and the subject matter, and the question is shall the judgment of that Court be respected by our Courts? Shall we mete to the parties the rights which, according to the decision of the Courts of our sister State, they have been decided to be entitled to? Were we called upon to enforce the illegal provisions of this will, the other questions might arise. But such is not the case. The simple question is whether the judgment of that Court shall be respected? If that judgment is to be respected, what is the effect? The property of John J. Salloy *was*

by a Court of competent jurisdiction decided under his will; and that judgment must conclude the rights of the parties."

In *Stoff* vs. *McGinn*, 178 Ill., 46, it is held that parties to a decree construing a will, rendered by a Court having jurisdiction of the parties and subject matter, which decree finds that real estate is to be regarded as personal property and directs the appointment of a trustee to sell and distribute, cannot while the decree remains in force, though unexecuted, have partition or recover the property as real estate, in any form of action."

Also that "Courts of Equity are authorized by law to construe wills in proper cases, and upon filing of the bill of complaint, the question of proper construction of the will was brought within the jurisdiction of the Court. If it could be said that the Court was mistaken in the conclusion that the will required the construction, and the appointment of a trustee, it would be merely erroneous. The decree could only be attacked for want of jurisdiction in the Court to adjudicate on the subject at all or to bind the persons of the parties, and the Court had in this case no right to overturn the construction there given in that case.

In *Brown* vs. *Brown*, 7 Southwestern Reporter, page 648, the Court uses this language, after discussing judgments *in rem* and *in personam*: "If in the last analysis, when, on the one hand, we compare probate cases with other litigations over the succession of personal and real property, and attempt to draw a clear distinction; and if, on the other hand, when we contrast those cases with proceedings purely *in rem*, we find the term, 'subject matter,' somewhat elusive, and difficult to reduce into legal harmony with the very material *res* involved in pure proceedings *in rem* on a ship, or a hundred bags of coffee—it must be remembered that the necessity arising from conflicts of jurisdiction over the successions to deceased persons' estates in different States, which have often been of the most perplexing and distressing character, and induced an appropriation of the principles governing proceedings *in rem*, rather than any perception of an absolute oneness of essence in the two classes of questions, and that they, indeed, that they both, spring out of common necessity and grow from the same root—the need in general to prevent conflicts over questions that in their nature cannot be confined to any one jurisdiction, or any one system of jurisprudence. But it would not be profitable to pursue this discussion further. Enough has been said to show that there is really no such common ground between probate cases and the case at bar as to require the extension to this case of the principles governing those. The analogy between the two classes of cases is accidental, not vital. Indeed, the Court may as well be asked to extend those cases to every contest over the title or succession to property, even when the contest is over the construction of a deed, or the terms of a verbal contract. This case thus holds that the actions for construction of wills are proceedings *in per-*

sonam and not *in rem*, and where Courts have jurisdiction of the persons interested therein, they may proceed to construe wills, and their judgments are binding between the parties everywhere.

This doctrine is also laid down as law in text books. In Black on Judgments, section 922, it is stated that Courts are bound to respect a decree of another State enforcing provisions of a will, even though such provisions would be contrary to the policy of their own laws.

In Black on Judgments, section 850, is found also the rule, that a judgment of a competent Court in a sister State is conclusive on the merits, extends equally to decrees in Chancery.

Thus, where a Court of Equity of another State, having jurisdiction of the parties, has made a decree declaring a certain judgment to be void for fraud and enjoining the execution of it, such decree is binding and conclusive on the parties in every other State; not indeed as being an injunction (for in that aspect it could have no territorial effect, nor affect Courts out of their jurisdiction), but as being the regular judgment of a Court of a sister State, and, therefore, entitled to full faith and credit in all Courts.

Again, section 808, we have already seen that decrees of probate, or decrees made in the granting of letters of administration, are considered as being *in rem*, and as conclusive upon all persons. So a suit to test the validity of a will is a proceeding *in rem*, and binding upon all parties in interest, whether parties to the issue or not. On the other hand, it has been decided that a suit for the construction of a testamentary writing is not in the nature of a proceeding *in rem*.

Again, Freeman on Judgments, section 608, states that actions or proceedings to set aside wills, or test their validity, are also generally proceedings *in rem*, while suits for their construction are *in personam*. See, also, *Brown* vs. *Brown*, 86 Tenn., 277; and *Freeman* vs. *Alderson*, 119 U. S., 187.

Herman on Estoppel and Res Judicata, vol. 1, page 617, and authorities there cited, says: "A decree by a Court of Equity in one State, directing a conveyance of land situate in another State, may be pleaded as a cause of action or as a defense in the Courts of the State where the land lies, although no conveyance has been executed; and unless impeached for fraud, is entitled in the Court where so pleaded to the force and effect of record evidence of the equities therein determined."

The cases and text books here cited show that, in cases where wills containing trusts are to be interpreted, in cases of contracts which are to be established and enforced, and in cases where frauds are to be prevented, Courts of Equity have jurisdiction wherever the persons interested in and effected thereby reside and are domiciled. They hold that such actions are *in personam*, and in the language of Chief Justice Marshall, "the strict primary decree of

a Court of Equity is *in personam*, and may be enforced in all cases where the persons are within the jurisdiction of the Court."

In the case at bar, part of the real estate of Mrs. Julia H. Clarke which was disposed of under her will, was located in South Carolina, all of the parties thereto were citizens of and domiciled in South Carolina, the will of Mrs. Clarke was probated there and was a valid will under the laws of South Carolina, as well as those of Connecticut, and the Court of Common Pleas for Richland County, in said State, was a Court of general equity jurisdiction, and had jurisdiction, therefore, of the parties and subject matter of said case, and the power to decree an interpretation and construction of said will, and such construction is binding upon said parties whenever and wherever said will is again brought in question upon the same point and between the same parties.

Not only have Courts of Equity of the domicil of parties the power to enforce contracts, to prevent frauds and construe wills which may effect real estate beyond their jurisdiction, but such decrees have been almost universally followed and respected by other Courts, where the questions therein determined have again arisen between the same parties.

I hereto attach some of the cases which are similar to the case now under consideration, and which show how careful the Courts of sister States have been to give full faith and credit to the decrees of the Courts of other States where such questions as these have arisen.

Indeed, it seems to me that the framers of our Constitution must have had just such cases in view when the article which requires full faith and credit to be given to judicial decisions of the States was framed. To do otherwise would work the utmost confusion, and entail a variety of construction and interpretation which would prevent an executor or trustee from administering the estate in his hands as a unit under the directions of one Court and one authority.

The following cases are in point and show how such questions have been acted upon by Courts of the several States:

Frances A. Burnley vs. *Edward O. Stevenson*, 24 O. St. Rep., 477:

STATEMENT OF FACTS.—The original action was brought in the Court of Common Pleas of Packaway County, by the plaintiffs in error, to recover from the defendants in error the possession of two undivided third parts of 606 acres of land, situate in said county, and being part of original survey No. 6943, in the Virginia military district. The plaintiffs sought to recover in the right of the heirs of Gen. Charles Scott, to whom the land described in this survey had been conveyed by the United States by patent, in the year 1812.

The defendant, by way of his defense, set up in his answer the following state of facts, to wit: That previous to the date of said

patent, Gen. Charles Scott, having received a warrant for 1,666 2-3 acres of land, for military services rendered by him in the Virginia line in the continental establishment, and employed one John Evans, a surveyor, to locate, survey and obtain patents for him, on said warrant on lands in the Virginia military district, and in consideration of the services of Evans in the premises, had agreed to convey to him one-fifth part of all lands so to be located, surveyed and patented; that Evans duly performed said services; that the lands embraced in survey 6,943, were part of the lands located, surveyed and patented to Gen. Scott under said warrant; that it was further agreed between Scott and Evans, that the share of Evans under the contract should be selected from lands in said survey; that soon after issuing the patents to Scott, he died, without having conveyed to Evans the lands to which he was entitled under said contract.

That afterwards Evans filed his bill in chancery, in the Circuit Court of Fayette County, Kentucky, against the heirs and legal representatives of said Scott (being the same persons under whom the plaintiffs claim title) to compel the specific performance of the contract, by a conveyance to him of the lands to which he was entitled thereunder; that said Court obtained jurisdiction of the persons of all the heirs, by service of process, and by voluntary attendance; that upon the final hearing of said case upon the bill, answers and exhibits, to wit: on the second day of February, 1816, the Court found the equity of the case in favor of Evans, and directed the defendants therein to convey to him the lands described in the petition of the plaintiffs below; that it was further decreed by said Court that in default of such conveyance by the defendants, one Robert Scott, a master commissioner of said Court, should make such conveyance; that said master executed and delivered to said Evans a deed in fee simple for said lands, on the 28th of May, 1817.

The defendant in his answer further sets forth, that he has succeeded to all the rights and title of John Evans in and to said lands, and avers that he and those under whom he claims, are now lawfully in possession thereof, and have so been in possession, claiming under said decree and deed from said master, ever since the date thereof.

To this defense the plaintiffs below filed their reply, to which the defendant demurred. The demurrer was sustained, to which ruling the plaintiffs excepted.

Judgment was, therefore, rendered in favor of the defendant below, and on error affirmed by the District Court. To reverse these judgments, this proceeding is now instituted.

For the motion:

"We think the issue is reduced to the single question: Can the decree of a Court of general jurisdiction, if you please, of a sister State, and a deed of a commissioner of said Court, made in pur-

suance of such decree, divest the title of the defendants in such decree, to land in the State of Ohio?"

By the Court:

That Courts having chancery powers in one State have jurisdiction to enforce a trust and to compel the specific performance of a contract in relation to lands situate in another State, after having obtained jurisdiction of the persons of those upon the obligation rests, is a doctrine fully settled by many cases. *Penn* vs. *Lord Baltimore*, Ves., 444; *Massie* vs. *Watts*, 6 Cranch, 148; *Penn.* vs. *Hayward*, 14 Ohio St., 302; and cases cited.

It does not follow, however, that a Court having power to compel the parties before it to convey lands situate in another State may make its own decree operate as such a conveyance. Indeed, it is well settled that a decree of such a Court cannot operate to transfer lands situated in a foreign jurisdiction. And this, for the reason that a judgment, or decree *in rem*, cannot operate beyond the limits of the jurisdiction or State wherein it is rendered. And if a decree in such case cannot effect the transfer of the title of such lands, it is clear that a deed executed by a master, under the direction of the Court, can have no greater effect.

The next inquiry, then, is as to the force and effect of the decree rendered by the Circuit Court, directing the heirs of Gen. Scott to convey the lands in Ohio to Evans. This decree was *in personam*, and bound the consciences of those against whom it was rendered. In it, the contract of their ancestor to make the conveyance was merged. The fact that the title which had descended to them was held by them in trust for Evans, was thus established by the decree of a Court of competent jurisdiction. Such decree is record evidence of that fact, and also of the fact that it became and was their duty to convey the legal title to him. The performance of that duty might have been enforced against them in that Court by attachment as for contempt, and the fact that the conveyance was not made in pursuance of the order, does not affect the validity of the decree in so far as it determined the equitable rights of the parties in the land in controversy. In our judgment, the parties and those holding under them with notice, are still bound thereby.

In the case of *Ford* vs. *Ford*, 80 Mich., the contest arose over the construction of a Wisconsin will made by a citizen of Wisconsin, whose domicil was Dane County, of that State. The testator owned lands in Michigan, and the executors had previously brought an action in the proper Courts of Wisconsin (70 Wisconsin, page 19), in which it was held that the will of the testator worked an equitable conversion of the realty of the testator into personalty. The Michigan Court, page 49, 80 Michigan, says, the Court of Wisconsin acted upon the assumption that it was the duty of that Court to absolutely construe the will of the testator, he being domiciled in Wisconsin, not only as to real and personal

estate situate in Wisconsin, but also as to the realty wherever situated, so far as to ascertain the true intent and meaning of the testator in making disposition of his whole estate, although holding that the *validity* of the provisions with reference to lands in other jurisdictions must be determined by Courts sitting within those jurisdictions. The Court then asks, are we then to take the will in this State under this ancillary proceeding and construe it as to the true intent and meaning of the testator as an original question, and without reference to the decision of the domiciliary Court, or must we be guided by the construction as to the meaning of the testator by the interpretation given it by that Court?

In our view of the case, the question does not become of much importance, but we think the law well settled, that the meaning and intent of the testator having been settled by the domiciliary Court, the Courts in foreign States and countries will be guided by such construction, unless it can be clearly gathered from the terms used in the will, that the testator had in mind the law of the place of the situs, or used language necessarily referring to the usages, and appropriate only to the situs.

This seems to be the settled rule in England, as well as in this country. *Trotter* vs. *Trotter*, 4 Bligh (N. S.), 502. Story on Conflict of Laws, 479a, says as to wills: "The general rule of the common law is that it is to be construed according to the laws of the place of his domicile in which it is made."

In *Washburn* vs. *Van Steenwyk*, 32 Minn., page 336, a testator owning real property in Wisconsin and in Minnesota, died in the former State, that being his domicil as well as that of his widow. The widow was insane. Administration was had upon the will in Wisconsin, and also in Minnesota, in respect to property in the latter State. An action was commenced in Wisconsin, in which all persons interested in the will were made parties, for the purpose of obtaining a judicial construction of the will, and, if it should be considered to present a case for election on the part of the widow, as between certain bequests made by the will in her behalf and her legal rights in the property of the testator, that an election might be made in her behalf. In that action it was finally determined that the will expressed the intention of the testator that the bequest in favor of the widow should be in lieu of her legal right in the testator's property, and not in addition thereto; that it presented a case for an election; and the Court of Wisconsin, acting in behalf of its insane ward, elected in her behalf to take under the will. The Court of Minnesota held that such determination as to the construction of the will was conclusive between the parties.

In the course of administration with respect to lands in Minnesota, the Probate Court there, in a proceeding by the guardian of Mrs. Washburn, made an election in behalf of the insane widow to take against the will. The adjudication involving this election

was prior to the final election made in Wisconsin. But an appeal upon questions of law and of fact was taken from the judgment of the Probate Court to the District Court, which appeal had the effect, under the Minnesota statutes, to transfer the cause to the District Court for trial *de novo*. Pending this appeal and before the new trial, final judgment was rendered and election made for the widow in Wisconsin, as above stated. On this state of facts the Minnesota Court held: 1. The Wisconsin Court had jurisdiction to make such election. 2. The election finally made and declared by the Wisconsin Court was effectual everywhere, as the election of the widow to take under the will, and precluded a different choice being made in respect to lands in Minnesota.

Judge Dickinson, in delivering the opinion of the Court in this case, says, that the Wisconsin Court had jurisdiction to entertain the question of the construction to be put upon the will, and to adjudicate thereon, is apparent, and need not be discussed. It is equally apparent that that adjudication was final, and concluded the parties to that controversy, which embraced all the parties interested. Neither this appellant nor these respondents would have been heard in that State to question the correctness of the construction of the will thus judicially declared. We feel no doubt that the same conclusive effect should be attributed to that judgment here and in this case, which involves the same questions, and is between the same parties. The adjudication was neither beyond the jurisdiction of the foreign Court, nor did it interfere with our State sovereignty. The disposition of the lands in this State, and in the course of administration here, is effected, not by the force of the decree of the foreign Court, but by force of our own laws and by the decrees of our own Courts. Our laws recognize a final adjudication upon the merits and between the proper parties, delivering the true import of such an instrument as concluding the parties to the controversy, whether that adjudication was in a domestic tribunal of competent jurisdiction, or in the tribunal of another State having jurisdiction. In giving effect to such an adjudication, we are enforcing our own laws and not the laws of another State. See, also *Cone* vs. *Hooper*, 18 Minn., page 536.

Crusoe vs. *Butler*, 36 Miss., 150. "This case involved the question as to the force and effect of a will of a testator domiciled in Alabama as to realty situated in Mississippi passing thereunder. Opinion: But it is again objected that the power to convey land was given by the will to the two executors, and being a matter resting in the discretion of both of them, that it required the joint deed of both of the executors to make a valid conveyance, and therefore, that the deed of Benjamin Leavens as sole executor is insufficient. It is above seen that the power to sell was not strictly executorial in its character, but a trust independent of the proper duties of the executor. It arose from a will executed by

a testator domiciled and who died in Alabama, and which was admitted to probate there. The nature, obligations and interpretations of the instrument and the rights and powers arising under it, must be determined by the law of that State. Story Conflict of Laws, sec. 262, 490, 479a, 479b, 479n."

"And it has been decided by the Supreme Court of that State in a suit involving the will, and between Leavens, the executor, and the plaintiff in this action, that the power granted might be exercised by the executor who qualified; and that it did not require the co-operation of both the individuals named as executors in the will * * * This must be taken as decisive of the point, however different it may be from the rule which this Court has held upon the same questions, and in a case governed by our laws." In *Guerard* vs. *Guerard*, 73 Ga., 506, the will devised all the property of the testator, both real and personal, including a lot in Georgia, to his wife for life, with remainder to the issue of the marriage living at her death, and default of such issue, to "his own right heirs," and when the wife of the testator died without issue and the property was claimed by the descendants of a brother of testator of the whole blood, and also by his brothers and sisters of the half blood, on the paternal side, it was admissible to prove that the testator was living in the State of Pennsylvania up to the date of his death, and when the will was made; that the property in Georgia was derived from his mother; that the testator had real and personal property in Pennsylvania, and that by the law of that State, at the time the will was made, the brothers and sisters of the whole blood would inherit in preference to the brothers and sisters of the half blood. Such evidence tended to show the intention of the testator and his meaning in using the words his "own right heirs."

Under these facts the descendants of the testator's brothers of the whole blood would take land in Georgia to the exclusion of the brothers and sisters of the half blood. The law of the domicil governs in the interpretation of the will of the testator. Here the words "own right heirs," were held to mean brothers of the whole blood, because used in reference to the law of his domicil, which gave to the brother of the whole blood in preference to the brother and sisters of the half blood.

See, also, *Donnelli* vs. *Donnelli*, 4 Bush Ky., 51.

Dammert vs. *Osborn*, 140 N. Y., 30.

In the case of *Harrison and others* vs *Nixon*, 9th Peters, page 502, Mr. Justice Story says: "The present is a case of a will; and so far as the matter of the bill is concerned, is exclusively confined to personalty bequeathed by that will. And the Court are called upon to give a construction to the terms of that will; and in an especial manner to ascertain who is meant by the words heir at law in the leading bequest in the will. The language of wills is not universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to

speak the sense of the testator, according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference; unless there is something in the language which repels or controls such a conclusion."

In regard to personalty in an especial manner, the law of the place of the testaor's domicil governs in the distribution thereof, and will govern in the interpretation of wills thereof, unless it is manifest that the testator had the laws of some other country in view.

This language is used by Judge Story in this case, and he also holds in the case that it was necessary in the interpretation of wills to know the domicil of the testator, and that wills are interpreted with reference to the laws and usages of the domicil, and this case was remanded to the lower Courts in order that the proper averments might be made in the bill and proper proof taken of the domicil of the testator, because no just interpretation could be given of the will without this knowledge.

I have thus shown that the parties to the actions in South Carolina and Connecticut were the same, that the subject matter was the same, that the South Carolina Courts had jurisdiction of the parties and subject matter of the action there, that the Courts of the several States of the Union where similar questions and cases have arisen have uniformly given full faith and credit to decrees and judgments of sister States interpreting wills, although they affect lands beyond their borders, the case at bar being the single exception, so far as my investigation goes.

The Supreme Court of Errors of the State of Connecticut has thus failed to give full faith and credit to a decree of its sister State in actions between the same parties and upon the same subject matter. The Constitution of the United States requires full faith and credit to be given to the judicial decisions in the several States of the Union by the Courts of the States when called in question by the same parties or privies in those Courts. The State of Connecticut has not given full faith and credit to the decree of the South Carolina Court in its interpretation of Mrs. Clarke's will. South Carolina was Mrs. Clarke's domicil, there the beneficiaries under her will resided, the Courts of that State had jurisdiction to interpret that will, and having done so, its decree is final and conclusive between the parties thereto, and the Courts of Connecticut erred in not giving that decree full faith and credit.

In Black on Judgments, par. 859, it is said: The Constitution requires that full faith and credit shall be given in each State to the records and judicial proceedings of every other State. Under this language, the status of a judgment rendered in one State and carried into another is peculiar. It is not in all respects a foreign judgment. For, as a matter of evidence and pleading, it is regarded as a record, and conclusive. But neither is it in all respects a domestic judgment. For it is not a proper foundation

for final process in the latter State, and, besides, it may there be impeached for want of jurisdiction. The true doctrine is that such a judgment is to receive in all Courts the same faith, credit and respect *that* is accorded to it *at home*.

See 116 U. S., *Renaud* vs. *Abbott*, 277.

In South Carolina, as we have shown, Mr. Clarke, as an individual, is ~~barred~~ bound by the South Carolina decree, and could not there question it again, as the Supreme Court of Errors of Connecticutt has held he might do, as an individual. He is ~~barred~~ bound by that decree in every relation that he bears to the estates of Julia H. Clarke, Julia Clarke and Nancy B. Clarke.

The Courts of Connecticut have erred in not holding Nancy B. Clarke bound by the South Carolina decree, because Henry P. Clarke is thereby estopped as an individual from ever questioning that decree in any of the Courts of the United States, and the Courts of Connecticut in not so holding have not given full faith and credit to the judicial decisions of her sister State South Carolina.

The following is the full record of the South Carolina case, and which I append as a part of this brief:

LeRoy F. Youmans

John S. Verner.

T

HEN

Th
of a
June,
Th

Th
name

Th
wife
subur
leavi

IE STATE OF SOUTH CAROLINA.

IN THE SUPREME COURT.

NOVEMBER TERM, 1895.

FIFTH CIRCUIT—RICHLAND COUNTY.

RY P. CLARKE, as Executor of the Last Will and Testa-ent of Julia H. Clarke, and Trustee of the Estate of Nancy . Clarke, His Infant Daughter, Under Said Will, Plaintiff, espondent,

against

NANCY B. CLARKE, Defendant, Appellant.

F. H. WESTON,
BACHMAN & YOUMANS,
Respondent's Attorneys.
WM. H. LYLES,
Appellant's Attorney.

Case for Appeal.

---

above entitled action was duly commenced by the service mmons and complaint on the defendant on the — day of 895.

following is a copy of the

COMPLAINT.

plaintiff above named, complaining of the defendant above alleges:

First.

on the 10th day of February, 1894, Julia H. Clarke, the the plaintiff, departed this life at her home in Waverly, a of the city of Columbia, in the county and State aforesaid, of force her last will and testament, dated May 25th, 1891,

and a codicil thereto dated November 11th, 1893, wherein and whereby she appointed the plaintiff executor thereof, which will and codicil were duly admitted to probate by the Probate Court of said Richland County, in said State, on the 14th day of February, 1894, and on the same day letters testamentary were duly issued thereon by said Court to the plaintiff, who duly qualified and entered on his duties as such executor, and is now the executor of said last will and testament.

Second.

That the following is a copy of said will and codicil:

"I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland County, State of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament and hereby revoke all other wills by me at any time heretofore made.

"First. I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named.

"Second. I direct that a portion of my estate, sufficient to produce one thousand dollars ($1,000.00) annually, shall be safely invested by my executor, and the said one thousand dollars be paid annually to my father, S. H. Hurd, now of New York city, in quarterly payments, during the term of his natural life.

"Third. I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Conn., the sum of ten thousand dollars ($10,000.00).

"Fourth. I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of five thousand dollars ($5,000.00).

"Fifth. The rest, residue and remainder of my estate, real and personal, of whatsoever description and wheresoever situated, I give, devise and bequeath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband in trust for my daughter Nancy (until she becomes twenty-five years of age, and then to pay the whole sum over to her, but if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage, and the other half when she becomes twenty-five).

"In case I shall leave surviving me one or more children besides my daughter Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children share and share alike, my husband and my children sharing *per capita*, and the shares of said children to be held in trust as above provided in the case of Nancy as being the only one.

"And I give, devise and bequeath the said rest, residue and remainder as aforesaid to each and to their heirs and each of them forever.

"I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will, and direct that no bonds be required of him under either appointment.

"In witness whereof, I have hereunto set my hand and seal at Bridgeport, Conn., this twenty-fifth (25th) day of May, A. D. 1891.

"JULIA H. CLARKE. [Seal.]

"Signed, sealed, published and declared as and for her last will and testament by the said Julia H. Clarke in our presence, who, in her presence and at her request, and in the presence of each other, have signed our names as witnesses thereto.

"WILLIAM H. COMLEY, Bridgeport, Ct.
"JOSEPH J. ROSE, Bridgeport, Ct.
"GEORGE P. CARROLL, Bridgeport, Ct."

"STATE OF SOUTH CAROLINA,
"COUNTY OF RICHLAND.

"I, Mrs. Julia H. Clarke, wife of Henry P. Clarke, formerly residing near Eastover, in the county and State aforesaid, but now residing in the city of Columbia, of said county and State, having made my last will and testament bearing date the 25th day of May, A. D. 1891, at Bridgeport, in the State of Connecticut, do now make this codicil to be taken as a part of the same.

"First. I hereby ratify and confirm my said will in every respect save so far as any part of it is inconsistent with this codicil.

"Second. I hereby revoke the third *item* of said will, and in lieu thereof I will and direct that a portion of my estate, sufficient to produce five hundred dollars annually, shall be safely invested by my executor, and the said five hundred be paid annually in quarterly payments to Mrs. Laura Sherwood, of Bridgeport, Conn., during the term of her natural life.

"Third. I further will and direct that after the death of said Mrs. Laura Sherwood that the portion of my estate, which shall at that time be invested for her benefit, under the second item of this codicil, shall then become a portion of my estate, and is hereby disposed of as directed in item five of my said will; and I further direct that if said Mrs. Laura Sherwood shall die before my death, then the investment directed for her benefit under item two of this codicil shall be and is hereby disposed of as directed in item five of my said will.

"Fourth. I further will and direct that after the death of my father, S. H. Hurd, that the portion of my estate which shall at that time be invested for his benefit, as directed in item two of my said will, shall then become a portion of my estate, and shall be disposed of as directed in item five of my said will; and I further direct that if my said father shall die before my death, then the

investment directed for his benefit in said item two shall be disposed of as directed in item five of my said will.

"In witness whereof I, the said Julia H. Clarke, have hereunto subscribed my name and set my seal to the foregoing codicil of four items, at Columbia, in said State, this 11th day of November, A. D. 1893.

"JULIA H. CLARKE. [L. S.]

"Signed, sealed, published and declared by the said Julia H. Clarke, the testatrix, as and for her codicil to her last will and testament in the presence of us, who, at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

"ELEANOR R. BENNETT,
"JOHN S. VERNER,
"F. H. WESTON."

Third.

That said testatrix left surviving her as the persons entitled under the said fifth residuary paragraph of said will, her husband, the said Henry P. Clarke, and their two infant daughters, Nancy B. Clarke and Julia Clarke. The said Julia Clarke departed this life at Waverly, aforesaid, on May the 20th, 1894, a little more than three months after the death of her said mother, in the fifth month of her age, intestate, unmarried and without issue, leaving as her heirs at law and the distributees of her estate her father, the said Henry P. Clarke, and her sister, the said Nancy B. Clarke. That the said Nancy B. is an infant in the seventh year of her age, residing with her said father at said Waverly; that the said Henry P. Clarke and the said Nancy B. are the only persons now entitled under the said fifth and residuary paragraph of said will, and that the testatrix, her deceased daughter, Julia, the said Henry P. Clarke and the said Nancy B. were all residents of the county and State aforesaid, and the said Henry P. Clarke and Nancy B. have continued to be and still are residents thereof.

Fourth.

That the property covered by the said will and the said fifth and residuary paragraph thereof consists of real and personal estate in the States of South Carolina, New York, Connecticut and Kansas, and is composed mainly of interests of the testatrix therein, which have not been severed from the interests of other persons.

Fifth.

That the plaintiff has undertaken the burthen of the administration of the estate of the testatrix, but is in doubt as to the true construction of said will, especially of the fifth and residuary

paragraph thereof, and as to his interests in authority, powers and duties as executor of and trustee under said will, especially as to whether the said will does as he has been advised or does not operate a conversion of the entire estate of the testatrix into personalty to be administered as such by the plaintiff as executor of and trustee under said will.

Wherefore the plaintiff prays judgment for the judgment and direction of the Court in regard to the true construction of said will, and especially the fifth and residuary paragraph thereof, and as to his powers and duties as said executor and trustee under said will in the premises, and for such other further relief as may be just and proper.

FRANCIS H. WESTON,
BACHMAN & YOUMANS,
Plaintiff's Attorneys.

Thereafter the defendant, by W. G. Childs, Esq., her duly appointed guardian *ad litem*, filed the following

ANSWER.

The defendant, Nancy B. Clarke, by W. G. Childs, Esq., her guardian *ad litem*, duly appointed by order of the Court of Common Pleas, of date the 8th day of July, 1895, answering the complaint herein, says that she is an infant of tender years, and therefore denies knowledge or information sufficient to form a belief as to the truth of the allegations of said complaint.

W. G. CHILDS,
Guardian ad litem.
WM. H. LYLES,
Attorney for Guardian ad litem.

Issue having thus been joined, upon due notice given, the following testimony was taken:

It is agreed between the counsel for plaintiff and defendant that the testimony herein be taken before a Notary Public.

HENRY P. CLARKE, a witness for plaintiff, being duly sworn, says:

Direct.

Q. What was your relation, Mr. Clarke, to Mrs. Julia H. Clarke? A. I was her husband.

Q. When did she die? A. February 10, 1894.

Q. Where did she die? A. At my residence in Waverly, a suburb of the city of Columbia, S. C.

Q. Did she die testate or intestate? A. She left a will.

A certified copy of the last will and testament of Julia H.

Clarke introduced, dated May 25, 1891, admitted to probate in Richland County, February 14, 1894.

Letters testamentary to witness as executor, February 14, 1894, exhibited.

Q. What family did Mrs. Clarke leave surviving her? A. She left two daughters and myself.

Q. Left witness, her husband, and two daughters? A. Yes, sir.

Q. Name them. A. Nancy Barnum Clarke and Julia Clarke.

Q. What is the age of Nancy Barnum Clarke? A. She was six years old February 6, 1895.

Q. How as to Julia Clarke, the other daughter? A. She was born in the latter part of December, 1893, and died May 20, 1894.

Q. Where does the infant, Nancy B., reside? A. She resides with me at my home.

Q. At what place, sir? A. In Waverly, Columbia, S. C.

Q. Where had Mrs. Clarke, her daughter, Nancy, the deceased daughter, Julia, and yourself been residing previously? A. At Waverly, city of Columbia, S. C.

Q. For what time had you and Mrs. Clarke been residents of Richland County, S. C.? A. We have been residents of Richland since 1886.

Q. Did Mrs. Clarke die possessed of any real estate in South Carolina? A. Yes, sir.

Q. She owned a plantation in this county and in Sumter? A. Partly in Richland and partly in Sumter, yes, sir.

Q. What is it known as? A. Known as Good Will Plantation.

Q. How many acres does it contain? A. About 5,000 acres.

Q. What was that property worth, would you say, at the time of her death? A. About $20,000.

Q. Was that the only real estate she died possessed of in South Carolina? A. Yes, sir, to the best of my knowledge.

Q. How as to her personal property? A. (Inventory of her personal estate introduced, amount $825.25). This is all I know of. She had no other personal property in possession.

Q. Had she interest under will or otherwise? A. Yes, under the will of her grand-father, Phineas T. Barnum, of Bridgeport, Connecticut. An unsevered interest.

Q. In what different States did this property lie? A. Connecticut, New York and Kansas.

Q. Did Mrs. Clarke die indebted? A. She left debts, yes, sir.

Q. In round numbers, about how much was she indebted at the time of her death? A. I should say very close to $30,000.

Q. The $100,000 legacy which was left to Mrs. Clarke by the will of Phineas T. Barnum, had that been advanced in her lifetime or not? A. She had received it all prior to her death.

Q. Mrs. Clarke was a lady of good intelligence? A. Yes, sir.

Q. In perfect health at the time of making her will and codicil? A. Yes, sir.

Q. She was cognizant of the state of her affairs and property? A. Yes, sir.

The Statutes of the States of New York, Connecticut and Kansas as to the distribution of intestate estates introduced.

Q. This inventory that has been introduced contains her entire personal estate? A. Yes, sir.

Q. Did you state where the child, Julia, died? A. Died at Waverly.

Q. The entire family reside together? A. The entire family.

Q. Those surviving still reside there? A. Yes, sir.

Q. Had this legacy of $100,000 been spent by Mrs. Clarke in her lifetime? A. Yes, sir. She had spent it in her lifetime.

At the time of the execution of her will and codicil and at the time of her death, Mrs. Clarke thought that she would receive several hundred thousand dollars under her grand-father's will, and that the share would consist of real and personal estate.

Cross-examined by W. H. Lyles, Esq.

Q. Mr. Clarke, has a sufficient fund come into your hands as executor of the will in question out of the personal estate of Mrs. Clarke to pay the pecuniary legacies that she gave in the will, and to provide a fund for the annuities which she has given and pay the debts of the esatte? A. No, sir. There has not a sufficient sum come into my hands—not near sufficient.

Q. Will it be necessary for you to resort to the real estate to pay these debts? A. I have had to resort to the sale of real estate for the purpose of paying debts and legacies in part, and will have to further resort to it to discharge them in full.

Examination adjourned till August 2.

AUGUST 2.

Mr. H. P. CLARKE, recalled:

In the property which Mrs. Clarke expected to receive under the will of Mr. Barnum, there were no considerations of the nature of ancestral home, or other local attachment.

There was interposed by Mr. Barnum's will a life estate, that of Mrs. Nancy Barnum, his widow, between his death and Mrs. Clarke's enjoyment of a very considerable portion of what personalty she might receive under the will, say four-fifths thereof, if she received personalty as part of her share.

Mrs. Nancy Barnum was forty years younger than her husband.

The matter within dashes objected to by Mr. Lyles:

Mrs. Clarke's intention was to convert what she might receive under the will into money and invest it in South Carolina.

Her reasons for this were that in the North and West she would have to have her property, if there, managed by agents, and would receive a less rate of interest than that which ruled in the South. In the South she would save expenses and commissions of agents, and could manage or supervise the management personally, besides obtaining higher rates of interest.

Plaintiff had moved South to Richland County in January, 1886. My marriage took place in New York in June, 1886.

From that time Richland County was continuously her home, and her intention was to reside here the remainder of her days.

The following was objected to by Mr. Lyles:

In the event of any of the beneficiaries under her will dying intestate, Mrs. Clarke believed that the property of such beneficiary would be distributable under the South Carolina laws for the distribution of intestate estates.

P. T. Barnum's will introduced in evidence.

Upon these pleadings and the testimony thus taken, the case came on to be tried before Hon. D. A. Townsend, Circuit Judge, presiding in the Courts of the Fifth Judicial Circuit, at his chambers, Edgefield, S. C., while holding the term of the Circuit Court for said county, on the — day of August, 1895. His Honor thereafter filed the following

DECREE.

This cause was heard by me while holding the Circuit Court for the Fifth Circuit, presiding at Edgefield, at my chambers, by the written consent of the attorneys of the parties, and W. G. Childs, the guardian *ad litem* of the defendant, an infant (R. S., sections 2247-8-9, Code, section 144, as amended by A. A., December 24th, 1894, 21st, 793), upon the complaint, answer and evidence appended.

AS TO THE TESTIMONY.

Under my apprehension of the principles announced in Wigram on Wills, page 12, Prop. v. Pl. 17, page pl. 76, page 82 pl. 104, *Roseborough* v. *Hemphill*, 5 Rich. Eq., 105, and *Lawrens* v. *Read*, 14 Rich. Eq., 268, 269, I hold those portions of the testimony objected to by defendant's counsel admissible, to wit: "Mrs. Clarke's intention was to convert what she might receive under the will (of P. T. Barnum) into money and invest it in South Carolina. Her reasons for this were that in the North and West she would have to have her property, if there, managed by agents, and would receive a less rate of interest than that which ruled in

the South. In the South she would save expenses and commissions of agents, and could manage or supervise the management personally, besides obtaining higher rates of interest." * * * *

"In the event of any of the beneficiaries under her will dying intestate, Mrs. Clarke believed that the property of such beneficiary would be distributable under the South Carolina laws for the distribution of intestate estates."

While this ruling is in harmony with my subsequent findings, still these latter are made independently of and without aid from the testimony objected to, and I would make the same findings even had I held said testimony inadmissible, and excluded it.

I find that the allegations of fact in the complaint are each and every one of them true; they have been proved by the testimony.

I further find:

I. That the value of the available personal estate of which the testatrix, Mrs. Clarke, died possessed, was $825.25.

II. That the debts owed by her at the time of her decease amounted to about $30,000.00.

III. That it would require about $35,000.00 to raise the sums necessitated by the provisions in her will in favor of S. H. Hurd, her father; Mrs. Laura Sherwood and Miss Agnes C. Patterson, and

IV. That it was the intention of the testatrix, apparent from the words of her will, that such portion of the rest, residue and remainder of her estate as might consist of realty should not pass as such into the possession of her husband and children, but should be converted into money, and pass into their possession as money in equal shares, they taking *per capita*.

I will briefly state the principles of law, which, taken along with the patent facts in the case, control me in making this finding:

"Whenever there is an absolute necessity to sell in order to execute the will, or wherever there is such a blending of the real and personal estate by a testator in his will, as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money, an intent to convert will be implied, and conversion is always a question of intent."

Among the many authorities in support of this, suffice it to refer among text books to—

Bispham's Principles of Equity, 311, *et seq.;* and among decided cases to—

Hunt's Appeal, 105 Pa. St., 128, 141, and cases which have followed in its wake, *inter alia.*

Appeal of Paist, 17 Atlantic Reporter, 6 (Pa.)

In re Marshall's estate, 23 Atlantic Reporter, 391, and the early leading cases of—

Fletcher v. *Ashburner*, 1 Brown's Ch. cases, 590, and the English and American notes thereto.

1 White & Tudor's Leading Cases in Equity, pt. 2.

In the case at bar, all these principles which separately mark conversion unite.

To raise the $65,000,00 necessary to pay the debts of testatrix, and to make the provisions required by the will of testatrix for her father, S. H. Hurd, Mrs. Sherwood and Miss Patterson, there is an absolute necessity to sell to execute the will.

That there is such a blending of the real and personal estate by the testatrix in her will as clearly to show that she intended to create a fund out of both real and personal estate, and as to the effect, in the connection used, of the words "rest, residue and remainder." See cases already cited, and—

Inter alia, Jaudon v. *Ducker*, 27 South Carolina 295.

Moore v. *Davidson*, 22 South Carolina, 93.

Bryan v. *Munton*, 1 R. and M., 503, 5 Eng. Ch. Rpts.

That the shares of the daughters were to go into their hands, as money is put beyond question by the use of the words "pay the sum."

U. S. v. *Anken*, 96 U. S., 308.

Rapalje and Lawrence Law Dict., 941.

Delafield v. *Barlow*, 107 N. Y., 535.

Cherry v. *Greene*, 115, 111, 591.

Going v. *Emery*, 16 Pick., 112; 26 Am. Dec., 645.

Dodge v. *Williams*, 46 Wis., 70.

Dodge v. *Pond*, 23 N. Y., 69

Belcher v. *Belcher*, 38 N. J. Eq., 126.

If each of the children was to be paid *a sum in money* and the husband took the same share, he must take his share in money, on the perfect and complete equality scheme of the will, it would seem.

Morehouse v. *Scaife*, 2 M. and C., 707, 708.

Given v. *Holton*, 95 U. S., 591.

"The inquiry," says Adam's Equity, page 139, "is whether the effective trusts do or do not require the conversion to be made." Here the will and facts show that they do.

The laws of the devolution of real estate of intestates being different in the different States where testatrix's various parcels of real estate lay, it can only be by the blending into one fund as personalty, of the real and personalty, that the complete and perfect equality contemplated and ordered by the will can possibly go into effect, as to the realty which the deceased daughter might have received had she lived. If this passes through her as realty, when it does come into possession of her heirs according to the *lex rei sitae* of the various States, it would work an utter subversion of the equality scheme between husband and children, the prominent characteristic of the will. To effectuate this main intent, conversion, power of sale, or any other power necessary will be implied.

Penafield v. *Tower*, 46 N. W. Repr., 413.

In the construction of a will, the intention, whenever it can be legally ascertained, is to govern, and all the rules of construction serve but to attain that end.

Fronty v. *Fronty*, Bail. Eq., 526.

The plaintiff has come properly into the Court of Equity to obtain its judgment for his guide in accordance with his "unquestionable right."

Brown v. *McDonald*, 1 Hill Ch., 300, and to the Court of the domicil of the testatrix, the proper one to be resorted to.

Am. and Eng. Enc. of Law, 635, *et seq.*, and notes.

It is, therefore,

Ordered, adjudged and decreed, That the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description, and wheresoever situated, and that the plaintiff, as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree.

D. A. TOWNSEND,
Presiding Judge.

A true copy.
August 30th, 1895.

The defendant thereafter, by her guardian *ad litem*, filed the following exceptions, and gave due notice of appeal, as follows:

NOTICE AND EXCEPTIONS.

Please take notice, That, for the purpose of appealing to the Supreme Court, the defendant, Nancy B. Clarke, by W. G. Childs, Esq., her guardian *ad litem*, excepts to the decree of Honorable D. A. Townsend, filed in said cause, upon the following grounds, to wit:

1. Because His Honor overruled defendant's objection to the testimony of the witness, Henry P. Clarke, as follows, to wit:

"Mrs. Clark's intention was to convert what she might receive under the will (of P. T. Barnum) into money and invest it in South Carolina. Her reasons for this were that in the North and West she would have to have her property, if there, managed by agents, and would receive a less rate of interest than that which ruled in the South. In the South she would save expenses and commissions of agents, and could manage or supervise the management personally, besides obtaining higher rates of interest." * * * *

"In the event of any of the beneficiaries under her will dying intestate, Mrs. Clarke believed that the property of such benefi-

ciary would be distributable under the South Carolina laws for the distribution of intestate estates."

2. Because he found as a fact, "That it was the intention of the testatrix, apparent from the words of her will, that such portion of the rest, residue and remainder of her estate as might consist of realty should not pass as such into the possession of her husband and children, but should be converted into money, and pass into their possession as money in equal shares, they taking *per capita.*"

3. Because, from the construction of the will, he concluded that there was an absolute necessity to sell the real estate of the deceased to execute the will.

4. Because, from the construction of the will, he held that there was such a blending of the real and personal estate by the testatrix in her will as clearly to show that she intended to create a new fund out of both real and personal estate.

5. Because he held, as a conclusion from the construction of the will, that the testatrix had directed a conversion of her entire estate into personalty, and adjudged, "That the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated; and that the plaintiff, as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree."

WM. H. LYLES,
Attorney for Nancy B. Clarke, Defendant, and
W. G. CHILDS,
Guardian ad litem.

To F. H. Weston, Esq., and Messrs. Bachman & Youmans, Plaintiff's Attorneys.

Please take notice that the defendant, Nancy B. Clarke, by W. G. Childs, Esq., her guardian *ad litem*, intends to appeal to the Supreme Court from the decree of Honorable D. A. Townsend, filed in said cause, upon the grounds stated in the exceptions herewith served, and to be embodied in the "Case for Appeal."

W. H. LYLES,
Attorney for Nancy B. Clarke, Defendant, and
W. G. CHILDS,
Guardian ad litem.

To F. H. Weston, Esq., and Messrs. Bachman & Youmans, Plaintiff's Attorneys.

We hereby agree that the foregoing shall constitute the "Case for Appeal" in the above entitled cause, that the same shall be printed with reasonable dispatch, and when printed that a copy

thereof shall be signed by counsel for plaintiff and defendant as the agreed "Case for Appeal" to be filed in the Circuit Court, and that another copy thereof shall be signed by the same counsel as and for the "Return" to the Supreme Court, the filing of any other or further "Return" being dispensed with.

The following is the decree of the Supreme Court of South Carolina in this "Case," which is found in 46th S. C., p. 235:

MR. JUSTICE POPE. On the 29th day of June, 1895, the plaintiff above named commenced his action in the Court of Common Pleas for Richland County against the defendant, wherein he prayed the judgment of the Court, for its direction to him in regard to the true construction of the last will and testament, and codicil thereto, of his deceased wife, Mrs. Julia H. Clarke, especially the fifth clause thereof, and as to his powers and duties as said executor and trustee under said will, and for such other relief as is consistent with his case as made. The answer of the defendant, who was an infant of tender years, by her guardian *ad litem*, duly appointed by the Court of Common Pleas for Richland County, in effect submitted her rights to the protection of the Court. The facts of the case are about as follows: Henry P. Clarke, the plaintiff, while domiciled in the State of South Carolina, intermarried with Julia Hurd, in the State of New York, in the year 1886, and the married couple immediately returned to the State of South Carolina, which before the marriage had been adopted as the domicile of the husband, and that State became the domicile of the marriage. In 1891 a daughter, the defendant, Nancy B. Clarke, was born. In 1893 another daughter, Julia Clarke, was born. In 1894 the wife, Julia H. Clarke, died. In May, 1894, the daughter, Julia Clarke, died. For some years after the said marriage the plaintiff and his wife lived on their plantation near Eastover, in Richland County, in this State, and during their residence at that place, and while on a visit to relatives at the North, the wife, Mrs. Julia H. Clarke, made the following will:

"I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland County, State of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament, and hereby revoke all other wills by me at any time heretofore made: First. I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named. Second. I direct that a portion of my estate, sufficient to produce $1,000 annually, shall be safely invested by my executor, and the said $1,000 be paid annually to my father, S. H. Hurd, now in New York city, in quarterly payments,

during his natural life. Third. I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Conn., the sum of $10,000. Fourth. I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of $5,000. Fifth. The rest, residue and remainder of my estate, real and personal, of whatsoever description and wherever situated, I give, devise and bequeath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay over the whole sum to her; but if she shall marry before that age, with the consent and approval of her father, or, in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage, and the other half when she becomes twenty-five. In case I shall leave surviving me one or more children besides my daughter, Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of my said children to be held in trust as above provided in the case of Nancy as being the only one. And I give, devise and bequeath the said rest, residue and remainder as aforesaid to each, and to their heirs and each of them forever. I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will, and direct that no bond be required of him under either appointment."

On the 11th day of November, 1893, at her residence near the city of Columbia, in Richland County, and State of South Carolina, the said Mrs. Julia H. Clarke made a codicil to her said last will and testament, wherein she fully ratified and confirmed said last will and testatemnt, except that she revoked the third item or clause thereof, and in lieu of the provision therein contained in favor of Mrs. Laura Sherwood, of Bridgeport, Connecticut, directed her executor to safely invest such portion of her estate as would yield $500 per annum, and pay the said $500 annually, in quarterly payments, to the said Mrs. Laura Sherwood during her natural life. And she also provided that such parts of her estate as had been invested by her executor to yield the annual payment of $1,000 to her father, S. H. Hurd, and of $500 to Mrs. Laura Sherwood, after the death of each one respectively, should revert to her estate, and be disposed of as under the fifth item or clause of her said last will and testament.

The will and codicil were duly established in the Court of Probate for Richland County, in the State of South Carolina. The plaintiff qualified as her executor. All of the personal estate of the testatrix in the State of South Carolina was $825. Her real estate in the latter State was valued at about $20,000. Her debts amounted to about $30,000. The amount necessary to be invested to raise the annual sums to the said S. H. Hurd and the

said Mrs. Laura Sherwood was about $22,000, and to pay the legacy of Miss Agnes C. Patterson was $5,000, making an aggregate of about $57,000. But the testatrix was entitled to the one-sixth part of the estate of her grand-father, the late P. T. Barnum, of Bridgeport, Connecticut, consisting of real and personal estate, in a part of which the widow of the late P. T. Barnum had a life estate. The estate of the late P. T. Barnum was located in three States—Connecticut, New York, and Kansas. Under the statute law of Kansas, whatever lands descended to the infant, Julia Clarke, through her mother, the testatrix, on her death vested in her father, the plaintiff. Under the statutes of New York, such share descended to the father for his life, with remainder to the infant defendant, Nancy B. Clarke. While in Connecticut, such estate of the infant, Julia Clarke, would vest absolutely in the defendant, Nancy B. Clarke. While, to the contrary, if, under the provisions of the will of Mrs. Julia H. Clarke, deceased, her whole estate in the States of South Carolina, Connecticut, Kansas, and New York, the rest, residue, and remainder of testatrix's estate, after the payment of debts and legacies, would devolve in equal portions upon the plaintiff, Henry P. Clarke, and the defendant, Nancy B. Clarke—for, of course, the State of South Carolina being the State of domicile of both Mrs. Julia H. Clarke, the testatrix, as well as that of her infant deceased daughter, Julia Clarke, the personal estate of said infant daughter, Julia Clarke, would be equally divided between her father, the plaintiff, and the defendant, her sister. The plaintiff filling both the office of executor and that of trustee for his infant daughter, the defendant, was naturally strongly moved by the responsibility thus devolved upon him, and a little more than a year after his wife's death exhibited his complaint in the Court of Common Pleas for Richland County, in this State, which was the Court of the domicile of all parties, wherein he seeks the aid of that Court in the proper discharge of the duties of his two offices of executor and trustee. The hearing came on before Judge D. A. Townsend upon the pleadings and some testimony. The first question submitted to the Judge was the competency of certain testimony offered by the plaintiff; the testimony objected to was that of the plaintiff himself, which was: "Mrs. Clarke's intention was to convert what she would receive under the will (the will of her grand-father, P. T. Barnum), into money and invest it in South Carolina. Her reasons for this were, that in the North and West she would have to have her property, if there, managed by agents, and would receive a less rate of interest than that which ruled in the South. In the South she would save expenses and commissions of agents, and could manage or supervise the management personally, besides receiving higher rates of interest. In the event of any of the beneficiaries under the will dying intestate, Mrs. Clarke believed that the property of such

beneficiary would be distributable under the South Carolina laws for the distribution of intestate estates." The Circuit Judge ruled that this testimony was admissible. Such ruling is excepted to, and forms part of the appeal here taken.

The Circuit Judge made his decree, which will be reported. The defendant appeals, also, from that decree. All the exceptions will be reported. Was the Circuit Judge in error in admitting the testimony excepted to?

The object of this testimony was to show that Mrs. Clarke had a certain intention guiding and controlling her in framing the disposition of her property by this will. We have always understood the rule of law as enforced by the Courts of this State regulating the competency of testimony of this character to be, that anything that will show the surroundings of a testator—his family, their names, age or sex, his property, its name, value or character, his use of words, if in any way peculiar, or to explain any ambiguous expressions occurring in the will—is admissible. We have never known that testimony as to an *intention*, separate and apart from that conveyed by the language used in the will, could be held competent. As was well said by the late Chancellor Job Johnstone, in *Rosborough* vs. *Hemphill*, 5 Rich. Eq., 107: "It is conceived that if the effect or purpose of parol evidence is to introduce into a will matter which it does not contain, so as to constitute it a part of the will; to give to the will in itself considered, operative elements, language or provisions which were not in it before, then such evidence is incompetent in a Court whose sole function is to construe wills * * * Such evidence is very different from that which is offered for the purpose of affording a light by which what is *in* the will, may be read, understood, and applied, which is always proper." It seems to us, that so much of the testimony offered which relates to the purpose in life of Mrs. Clarke in withdrawing her property from the North and West and locating the same in South Carolina, is incompetent, because there are no words manifesting any such purpose as written in her will itself; it would be, in effect, *adding to the will* to allow such testimony, and all will admit that this cannot be done in this way. And we are equally clear, that the last part of this testimony, relating to what the testator thought would occur if any one of the beneficiaries should die intestate before a final distribution of her bounty could be made, for there occurs no language in the will that points to any such contingency. This would certainly be adding a new provision to the will. These exceptions must be sustained, but in so doing we do not help the appellant very materially, for the Circuit Judge distinctly states in his decree that he does not base his decision upon this testimony, although he admitted it as competent; and now we approach the true battle ground.

The second, third, fourth, and fifth grounds raise the issue that

the provisions of the will *as written,* when properly construed, develop the conclusion that the testatrix intended that her real property, wheresoever situated, and of whatsoever description, should become personalty. That such result obtains from the language used in wills when properly construed, in same cases, must be admitted. The Courts of the mother country so hold. The Courts of this country—both federal and State—so hold. In what cases will such a conclusion be proper? We answer, in all those cases where the provision of the will itself manifest that such was the testator's *intention,* if such intention be legal. This intent of the testator when manifested by the language used in the will must be, if legal, carried into execution, for equity looks at the intent rather than the form, and one of its maxims is that equity treats that as done which, in good conscience, ought to be done—so declares, in substance, Mr. Pomeroy, in 1 vol, page 413, of his work on Equity Jurisprudence. We do not hold that a direction by the testator that his lands be sold should appear in the will in order that realty shall become personalty, and we do not know that we can more clearly express our views on this phase of the question than by quoting the language of Mr. Justice F. H. Wardlaw, used in announcing the opinion of this Court in the case of *Farmer* vs. *Shull,* 11 Rich. Eq., 547 and 548, which was as follows: "Equitable conversion of realty into personalty is effected, in strictness, only where a sale of the land is ordered, and disposition of the proceeds is made; *but if the intention to dispose of the subject as personalty can be ascertained from the face of the will, it may not be indispensible that a sale should be explicitly directed as a means of conversion*" (italics ours). "Chancellor Dargan says, with sufficient precision, in *Perry* vs. *Logan,* 5 Rich. Eq., 202: 'Wherever it is apparent from the words of the will that the testator meant that his real estate in that form should not pass into the possession of the objects of his testamentary bounty, but should be converted into money, and as money come to those for whom he designs the benefaction, this will be considered in equity as a bequest of personalty. Under such circumstances it will be treated in all respects as if the conversion had been made by the testator in his lifetime.' So, too, cases might be within the principle of conversion as to some incidents, when no alteration of the form of the estate was contemplated." We might multiply at great length quotations from other cases to the same effect, but we have always felt when our own State decisions recognize fully a principle of law as applied to our own affairs, that should be sufficient. Now, let us turn to the circumstances of this particular case. It is established that South Carolina was the domicile of this testatrix, and that her husband and two children surviving her, as the objects of her bounty, were also domiciled there; that her last will fully discloses that each of the three was to be made equal, one with the other, in the distribution of

her estate. The testatrix must be presumed to have known that, under the laws of this State, it was in her power, by her last will, to divide her whole estate, real and personal, as she might elect to do; and further, that, under our laws, in the event of the death of either husband or child, or children, the estate of the one so dying intestate would be shared equally by the two survivors, whether the estate was realty or personalty. But it must also be assumed that she knew the laws regulating intestate estates in the States of Connecticut, Kansas, and New York, where some of her estate, real and personal, was located. Further, it must be assumed that the testatrix knew of the extent of her estate wherever located, for the will of her grand-father, P. T. Barnum, disclosed the same and her interest therein. We do not think that the fact of her indebtedness to others and her legacies to others, aggregating $65,000, while her personal estate in South Carolina was only $825, operates to any extent to work the conversion of her realty into personalty, so far as the provisions of her will touching these matters is concerned.

How are we to regard the provisions of the fifth item or clause of the will? Do these provisions evince an intention of the testatrix to convert her realty into personalty? When the language at the beginnig of this item is considered, it will be seen that she masses, so to speak, her realty and personalty, in the terms "the rest, residue, and remainder of my estate," that is, all that should be left after the payment of her debts and legacies; and this "rest, residue, and remainder" she gives, devises, and bequeaths equally to her husband, for himself, and to him in trust for her daughter, Nancy, if she should be the only child left by her; but in the event there is another child, then she gives, devises, and bequeaths one-third of such rest, residue, and remainder to her husband, absolutely, for himself, and the other two-thirds to him, in trust, one-third for Nancy and one-third for Julia. The use by the testatrix of the term "devise" is of some signification, for usually such a term occurs in the testamentary disposition of an estate in realty, as such; and if there were no other words in the text of this will, negativing this idea of the use of the word "devise" being intended to convey her realty, as such, to these beneficiaries, this would end the matter. However, the use of a word of a technical significance in a will is not allowed, of itself, to fasten down the intent of a testatrix, if other words, phrases, expressions, and sentences or provisions of her will show that her use of this technical word was not intended by her to do more than to show that she meant her realty to pass, commingled with the personalty, under the terms the rest, residue, and remainder of her estate, to these three beneficiaries. It has been decided in this State, in the two cases, *Moore* vs. *Davidson*, 22 S. C., 94, and *Jaudon* vs. *Ducker*, 27 S. C., 295, that when a testator used the words "the rest, residue, and remainder of his estate," "he considered the estate as a

whole, without regard to nice distinction between the realty and personalty of which it was composed. This he had a right to do."

In the case at bar, it will be observed that no positive direction is included in the will for a sale of any of the lands belonging to testatrix for the payment of debts, legacies, or for distribution. The absence of such direction explicitly need occasion no difficulty in this case, for the executor was directed by the terms of the will to pay the debts and legacies, and this he could only do by an application of the property of his testatrix, when sold, to those purposes, and in the execution of this power, after the personal property of his testatrix was had, the lands could be sold; for it must be remembered, it is only "the rest, residue, and remainder of realty and personalty," *after the payments of debts and legacies,* that is given to the beneficiaries provided in the fifth item of the will. Of course, in the absence of explicit authority in the will to the executor to make sales of property to pay debts and legacies, such executor would have to apply to the Court for such leave for those purposes. What else is there in this will that will aid us in reaching the intention of the testatrix? It will be seen in the fifth item or clause that the testatrix, when she comes to speak of the duty of the plaintiff as to the one-half of the rest, residue, and remainder of her whole estate, real and personal, he shall receive in trust for his infant daughter, Nancy B. Clarke, declares that "he shall hold such one-half until she, Nancy, becomes twenty-five years of age, and then *to pay* the *whole sum* over to her; but if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that *one-half of her share shall be paid* to her upon her marriage, and the *other half* when she becomes twenty-five." Around these words revolve this contention. What was Mrs. Clarke's intention, as herein expressed, as to how she meant any share in her realty should be held by Nancy and Julia through their trustee? Was it to be as realty or personalty? Certainly the trustee was to hold two-thirds of the estate, which he received for his two daughters, for them. The will does not say he shall "turn over," but shall "pay over." What does "pay over" mean, when connected with the words "the whole sum," in the one instance, and one-half of her share on her marriage, and the other half of her share on attaining the age of twenty-five years? Surely it must mean that the sum of money from the commingled "rest, residue, and remainder of her whole estate, real and personal," when the same shall be converted into money, shall be paid. If it be so, will not equity construe that Mrs. Clarke, by the language used by her in her last will, has directed that her realty be converted into money, and paid two-thirds thereof to the plaintiff as trustee for his two daughters, and having so directed in her last will and tes-

tament, the Court of Equity, in the promotion of right, will now consider as done what ought to be done? We think this is the true intention of this testatrix.

The exceptions above enumerated to the decree must be overruled.

It is the judgment of this Court, that the judgment of the Circuit Court be affirmed.

No. 216.

Brf. of Youmans for P. in E.

Office Supreme Court U. S.
FILED
MAR 22 1900
JAMES H. MCKENNEY,
Clerk.

Filed Mar. 22, 1900.

SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

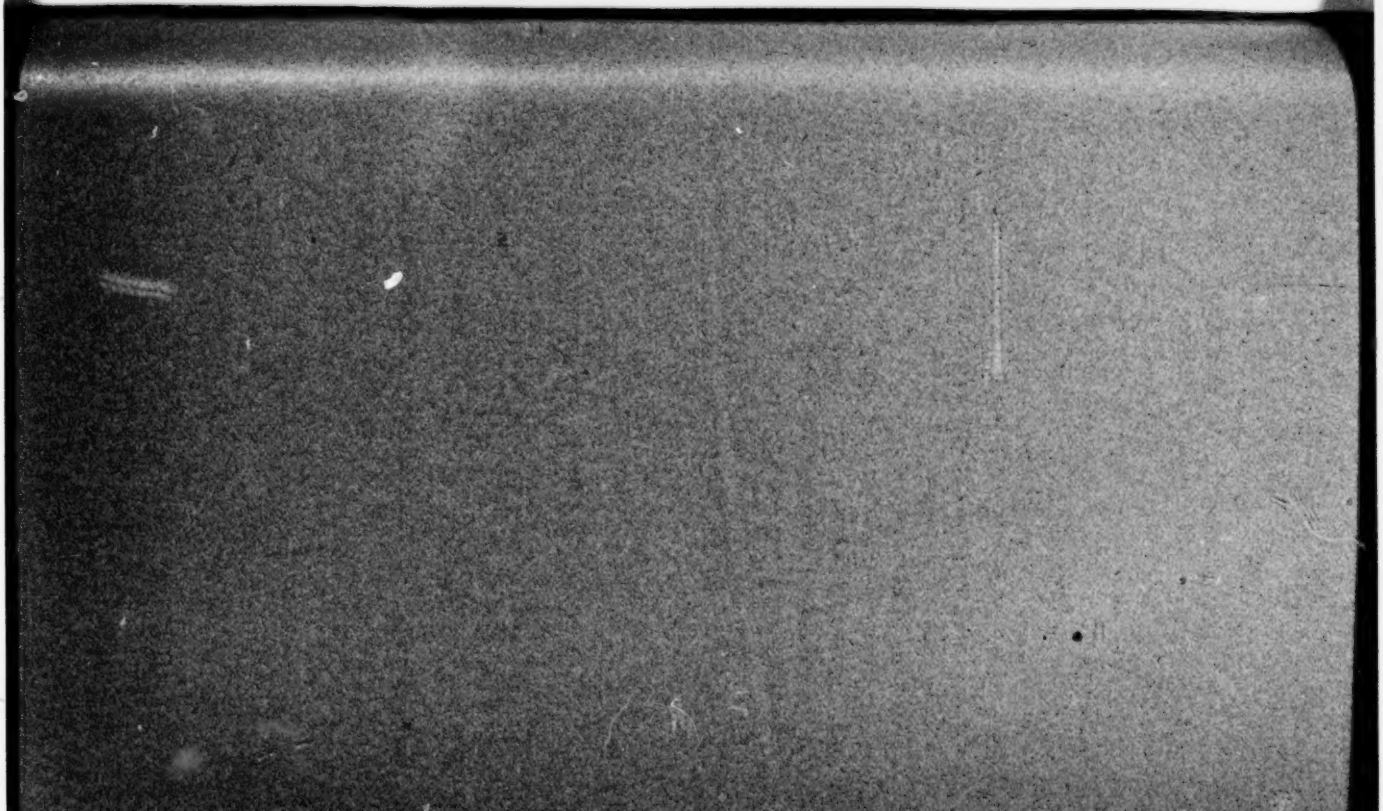
No. 216.

HENRY P. CLARKE, Plaintiff in error,

vs.

NANCY B. CLARKE, JOHN H. PERRY, Guardian *ad litem* of Nancy B. Clarke, and HENRY P. CLARKE, as administrator of the personal estate of Julia Clarke, deceased, defendants in error.

LEROY F. YOUMANS,
For Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

No. 216.

HENRY P. CLARKE, Plaintiff in error,

vs.

NANCY B. CLARKE, JOHN H. PERRY, Guardian *ad litem* of Nancy B. Clarke, and HENRY P. CLARKE, as administrator of the personal estate of Julia Clarke, deceased, defendants in error.

STATEMENT.

Mrs. Julia H. Clarke died testate February 10, 1894, in South Carolina, of which State she was and had been a citizen, and in which she had had her residence and domicile continuously from her marriage in 1886. She left surviving her, her husband Henry P. Clarke, and two daughters, Nancy B., then five years of age, and Julia, then one month old, all of whom also had their residence and domicile in said State. The daughter Julia died in said State May 20, 1894, three months and ten days after the death of her said mother, in the fifth month of her age.

Mrs. Clarke left of force a will and codicil thereto, which latter was executed in South Carolina, November 11, 1893. These were duly admitted to probate by the Probate Court for Richland County in said State, the County and State of her residence and domicile, February 14, 1895, and on the same day letters testamentary were duly granted by said Court to said Henry P. Clarke, who duly qualified as executor and entered upon his duties as such.

The fifth paragraph of the will is: "The rest, residue and remainder of my estate, real and personal, of whatsoever description and wheresoever situated, I give, devise and bequeath as follows: one half thereof to my husband, Henry P. Clarke, and one half thereof to my said husband in trust for my daughter Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her; but if she shall marry before that age with the consent and approval of her father, or in case of his death, with the approval and consent of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage, and the other half when she becomes twenty-five.

In case I shall leave surviving me one or more children, besides my daughter Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children share and share alike, my husband and my children sharing per capita, and the shares of said children to be held in trust as above provided in the case of Nancy as being the only one. And I give, devise and bequeath the said rest, residue and remainder as aforesaid to each and to their heirs and each of them forever.

I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will, and direct that no bond be required of him under either appointment."

The property covered by the will and this fifth and residuary paragraph thereof consisted of real and personal estate in the States of South Carolina, Connecticut, New York and Kansas, and was composed mainly of interests of the testatrix herein which had not been severed from the interests of other persons. The personal and real estate of the testatrix unsevered from the interests of other persons was totally insufficient to pay either her debts or the legacies created by her will. Henry P. Clarke, the excutor and trustee under said will, having undertaken the burden of the administration of the estate and of the trust confided to him, found himself embarrassed and in doubt as to the true construction of the will, especially of this

fifth and residuary paragraph thereof, and as to his interests in, authority, power and duties as executor of and trustee under said will, especially as to whether the will did or did not operate a conversion of the entire estate of the testratrix into personalty to be administered as such by the plaintiff as executor of and trustee under said will. He accordingly brought suit against the said Nancy B. Clarke, the only person besides himself, interested under said will and in said estate in the construction thereof, in the Circuit Court of Common Pleas for Richland County, South Carolina, the County of the residence and domicile of the testatrix, of himself and of the said Nancy B. Clarke, praying judgment for the judgment and direction of the Court in regard to the true construction of said will and especially the fifth and residuary paragraph thereof, and as to his powers and duties as said executor and trustee, and for such other and further relief as might be just and proper. Nancy B. Clarke was duly and properly served with process, and duly and properly represented in the cause, both in the said Court, and in the Supreme Court, the Appellate Court of last resort in the State. The Circuit Court in due course arrived at the conclusion "that it was the intention of the testatrix, apparent from the words of her will, that such portion of the rest residue and remainder of her estate as might consist of realty, should not pass as such into the possession of her husband and children, but should be converted into money, and pass into their possession, as money, in equal shares, they taking per capita." The Court ordered, adjudged, and decreed "That the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death, of all her real estate of whatsoever description, and wheresoever situated, and that the plaintiff as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree." From this decree and judgment of the Circuit

Court August 30,1895, an appeal was regularly taken by the said Nancy B. Clarke to the Supreme Court of the State of South Carolina, which on March 18, 1896, affirmed this judgment of the Circuit Court. The plaintiff in error contends that the Supreme Court of Errors of the State of Connecticut in its final judgment in the case at bar erred in not giving full faith and credit to these judicial proceedings of the State of South Carolina, the right to which was specially set up and claimed by him under Article four, Section one of the Constitution of the United States, and in deciding that the said will did not work an equitable conversion into personalty at the time of her death of the real estate of Julia H. Clarke, situate in the State of Connecticut, and that Nancy B. Clarke was sole heir of a certain undivided interest of the real estate of the said Julia H. Clarke in the State of Connecticut which interest passed as real estate under her said will, and assigns the same as error. The decisions of the Circuit and Supreme Court of South Carolina will be found in 46 So. Ca. page 235; of the Supreme Court of Errors of Connecticut in 70 Conn. p. 195 and p. 483.

AUTHORITIES.

The leading case upon the construction of Art. IV Sec. 1, Cons. U. S. and the Act of Congress in connection therewith is Mills vs. Duryee, 7 Cranch 483. Art. IV Sec. 1 reads thus: "Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and proceedings shall be proved, and the effect thereof." "It is argued that the Act of Congress 26 May, 1790, Ch. 11 Vol. 1 p. 122, now Section 905 Rev. Sts., provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The Act declares that the record duly authenticated shall have such faith and credit as it has in the State Court from whence it is taken. If in such Court it has the faith and credit of evidence of the highest nature, viz.: record evidence, it must have the same faith and credit in

every other Court. Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it. It remains only then to inquire in every case what is the effect of a judgment in the State where it is rendered. In the present case the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that State. It must therefore be conclusive here also." * * * Another objection is that the Act cannot have the effect contended for, because it does not enable the Courts of another State to issue executions directly on the original judgment. This objection, if it were valid, would equally apply to every other Court of the same State where the judgment was rendered. But it has no foundation. The right of a Court to issue execution depends upon its own powers and organization. Its judgments may be complete and perfect and have full effect independent of the right to issue execution. * * * were the construction contended for to prevail, that judgments of the State Courts ought to be considered prima facie evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the Act of Congress, unless it declares a judgment conclusive when a Court of the particular State where it is rendered would pronounce the same decision." Id. p. 485. * * * "When Congress gave the effect of a record to the judgment, it gave it all the collateral consequences." Mills vs. Duryee, 7 Cranch, 484. There is a dissenting opinion by Johnson J. alone, from an apprehension that receiving the plea of nul tiel record might at some future time involve the Court in inextricable difficulty. In his dissent he says inter alia that one of the eternal principles of justice which never ought to be dispensed with, and which Courts of Justice never can dispense with, but when compelled by positive stat-

ute, is that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction by being found within their limits. Id. 7, Cranch, 486.

Chief Justice Marshall who delivered the opinion of the Court in Mills vs. Duryee, says in the opinion of the Court, which he delivered in Hampton vs. McConnel, 3 Wheaton 235, that, "The doctrine there held was that the judgment of a State Court should have the same credit, validity and effect, in every other Court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none other, could be pleaded in any other Court in the United States."

"It is conclusive of everything decided by it." Morton & Co. vs. Naylor 1, Hill Ch. (So. Ca.) 445.

In connection with what Johnson J. says in Dungee vs. Mills in his dissenting opinion, that "Jurisdiction cannot be justly exercised by a State over property not within the reach of its process." See the opinion of the Court of in Massie vs. Watts, delivered by Marshall, C. J., 6 Cranch. 160. "Upon the authority of these cases," (to wit: Penn. vs. Lord Baltimore, 1 Vez. 444. Arglasse vs. Muscham p 1 Vernon 75. The Earl of Kildare vs. Sir Morrice Eustace and Fitzgerald, 1 Vern. 419. Toller vs. Carteret, 2 Vern. 494), and of others which are to be found in the books, as well as upon general principles, this Court is of opinion that in a case of fraud, of trust, or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person may be found, although lands not within the jurisdiction of that Court may be affected by the decree." * * * "Where the defendant in the original action is liable to the plaintiff as trustee, the principles of equity give a Court jurisdiction wherever the person may be found and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction," 158. As to the case of Penn. vs. Lord Baltimore, Mar-

shall, C. J., calls special attention to this that "In the subsequent part of the opinion, where he (the chancellor) treats of the objection to the jurisdiction of the Court, arising from its inability to enforce its decree in rem, he allows no weight to that argument." 6 Cranch. 159.

"Where the necessary parties are before a Court of Equity, it is immaterial that the res of the controversy, whether it be real or personal property is beyond the territorial jurisdiction of the tribunal. Without regard to the situation of the subject matter, such Courts consider the equities between the parties, and decree in personam according to those equities. Phelps vs. McDonald, 99 U. S. 308. The opinion of this Court in Cole vs. Cunningham, 133 U. S. 119, reaffirms this and goes on to say "Such is undoubtedly the result of the clear weight of authority, and the rule has been often applied by the Courts of the domicil against the attempts of some of its citizens to defeat the operation of its laws to the wrong and injury of others." The same case at page 125 cites with approbation from the leading case of Dehon vs. Foster, 4 Allen 545, this: "The defendants being citizens of this State are bound by its laws. They cannot be permitted to do any acts to evade or counteract their operation, the effect of which is to deprive other citizens of rights which those laws were intended to secure."

The dissenting opinion of Justices Miller, Field and Harlan in that case says: "The higher law of the Constitution of the United States places this restraint upon the Courts of Massachusetts in dealing even with her own citizens, that if her citizens have obtained rights in the Courts of New York which have become a part of the records and judicial proceedings of those Courts, no matter how the law under which those rights are established, may be opposed to the law of the State of Massachusetts, they are to be respected by the Courts of Massachusetts because they are effectual over the parties and subject matter in New York, and because the Constitution of the United States and the Act of Congress of May 26, 1790, assert the principle that the Courts of Massachusetts must give full

credit, by which is meant the same effect to the proceedings in New York which that State gives them. The Constitutional provision which makes this declaration is part of Article IV, and it is in immediate connection with its second section, which declares that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The meaning of this is to prevent conflicts between Courts of the different States over the same matters, by establishing the rule that whatever is done or decided in one State shall be respected in every other State when properly proved before it. These are the principles established by Green vs. Van Buskirk, 5 Wall. 307. 7 Wall. 199, after a most vigorous contest twice before this Court. Cole vs. Cunningham, 119 U. S. 136-7.

"Generally, if not universally, equity jurisdiction is exercised in personam, and not in rem, and depends upon the control of the Court over the parties, by reason of their presence or residence, and not upon the place where the land lies, in regard to which relief is sought." Hart vs. Sansom, 110 U. S. 154. "In cases of trust, of contract, and of fraud, the jurisdiction of a Court of Chancery may be sustained over the person notwithstanding lands not within the jurisdiction may be affected by the decree." Carpenter vs. Strange, 141 U. S. 105.

"The decree rendered in Indiana, if valid, so far as it related to the real property in question, bound personally those who were parties in the case, and could have been enforced in the situs rei by the proper proceedings conducted there for that purpose." Cheever vs. Wilson, 9 Wall. 121.

"It" (the legacy to Sarah Darling) "is a charge upon the rest of the real as well as the personal property of the testator. But he (the appellant) states that the real estate is in another sovereignty than that in which the plaintiff has sued, and is therefore out of the jurisdiction of this Court to make any decree concerning it. It is true that the Court cannot in such a case order the land to be sold for the payment of any decree which it may make in favor of the plaintiff. But it is not with-

out power to act efficiently to cause the defendant to pay any such decree. The land may be declared to be charged with the payment of the legacy so as to compel the parties who claim the same as the property of the testator to set off or sell a part of it for such purpose." Lewis vs. Darling, 16 Howard 13.

"As a portion of this railroad is found lying in both Circuits (the Fourth and the Sixth) the first question that presents itself for consideration is, which Court first obtained jurisdiction over the subject matter in controversy? Owens et. al. vs. Ohio Cent. R. R. Co. Central Trust Co. of N. Y. vs. Ohio Cent. R. R. Co., 20 Fed. Rpr. 11. * * * Marshall, C. J., in Smith vs. McIver, 9 Wheat. 532 says "that in all cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it. This rule, the Supreme Court of the United States has approved in several subsequent cases, notably, Buck vs. Colbath, 3 Wall. 341. Riggs vs. Johnson Co., 6 Wall. 166. Page 13. * * * The jurisdiction of a Court attaches upon the service of process, and the Court having gained prior jurisdiction of the cause by service of its process, is not deprived of its jurisdiction by reason of the actual seizure of the property in controversy by the officer of a Court having concurrent jurisdiction. Page 12. "But one question remains unnoticed, and that is, can this Court extend its jurisdiction over the defendant company's property beyond its geographical or territorial jurisdiction. This is a trust estate, and must be administered as an entirety for the protection of all concerned. It is well settled that the Court that first takes jurisdiction of a part of a trust estate has the legal right to administer upon the whole. The State Court in West Virginia acquired full and complete jurisdiction on the day the bill was filed in the Circuit Court of Mason County, and by reason of its removal to this Court, this Court's jurisdiction relates back to that date. It follows that this Court, having prior jurisdiction over that portion of the trust estate found in this (the Fourth) Circuit by reason of the jurisdiction thus acquired, has the right to administer upon that portion of the trust estate

lying between the Ohio river and Corning, Ohio, (in the Sixth Circuit), and an order will be entered extending the jurisdiction of Receiver Sharp over the entire property of the defendant company to that place; and in the event he is obstructed by anyone claiming to act as receiver by another tribunal, he is required and directed to file a motion before the United States Circuit Court for the Sixth Circuit in Ohio, praying that Court to vacate or so modify the order appointing Receiver Martin as it may be in conflict with the order of this Court appointing him receiver, and extending his jurisdiction to Corning, Ohio." Owens et. al. vs. Ohio Cent. R. R. Co. Central Trust Co. of New York vs. Ohio Cent. R. R. Co., 20 Fed. Repr. 15.

"As a rule Courts of Equity have no extra territorial jurisdiction, that is to say, they will not assume jurisdiction when all of the parties as well as the trust property are beyond the limits of the State. But after the Court has first acquired jurisdiction of a part of the trust estate, it is entitled to administer the whole, even though a portion lies within the doman of another State." 27 Am. and Eng. Encyc. of Law, 277-8.

"Judgments are the very voice of law and right." Co. Litt. 39 a. "A judgment permanently settles disputed questions of fact, and applies to the facts as thus settled, established principles of law. It declares the respective obligations of the litigants in regard to the matters which they have consented to submit to the decision of the Court." Freeman on Executions, Sec. 1. "A judgment is the final determination of the rights of the parties in the action." So. Ca. Code, Sec. 296. "The award of execution to produce satisfaction is no part of the judgment." Freeman on Judgments, Sec. 2. "Execution, Executio, signifyeth in law the obtaining of actual possession of anything acquired by judgment of law or by a fine executory levied, whether it be by the sheriff, or the entry of the party." Co. Litt. 154d. "Execution is the act of carrying into effect the final judgment of a Court, or other jurisdiction." Bouvier Law Dict. Tit. Exon. "An execution," says Marshall, C. J.,

in U. S. vs. Nourse, 9 Pet 28, "is the end of the law. It gives the successful party the fruits of his judgment." In Bullock vs. Bullock, N. J. Eq., 27 R. A. 217. Garrison, J., concurs with Magil, J., but only on the ground that the constitutional provision (Cons. U. S. Art. IV, Sec. 1) extends only to judgments and does not embrace executions. "The transcendent force given by the federal law to the judicial proceedings of sister States is confined to such judicial determinations as possess the quality of judgment; it does not extend to proceedings in the nature of executions, or to orders merely ancillary in some special form of relief. That only is judgment that is pronounced between the parties to the action upon the matters submitted to the Court for decision. To judgments thus rendered, the federal law accords in every State the same conclusive force possessed in the State where they are rendered. After judgment in a State Court, all that follows for the purpose of enabling the successful party to reap the benefits of the determination in his favor is execution or in aid of execution. No interpretation has ever been placed upon the federal constitution giving conclusive effect, or indeed any effect at all to the executions of the judgments rendered in sister States, or to any order merely in aid thereof. Such orders lack the quality of judgment, and must be differentiated from judgments, even though embodied in the same decretal orders that pronounce the judgment of the Court. These decretal orders may be defined to be decisions made touching some matter collateral to the issue presented in the record, or required to be passed upon in order to carry into execution the judgment of the Court. To these determinations ancillary to execution, no extra-territorial force is given by the federal law."

Van Sykell dissenting 27 L. R. A. 218, holds: "That the New York decree did not by mere force of the judgment, it being extra-territorial, create a lien upon the lands in New Jersey; yet it was conclusive in favor of the wife's right to have alimony secured by a mortgage on her husband's New Jersey lands, and to have that lien impressed upon them by the New

Jersey Courts. To impress that lien upon lands in New Jersey, the intervention of the New Jersey Court of Equity is necessary, just as it is necessary to sue in New Jersey upon a New York judgment, before execution can issue from the New Jersey Courts." Dixon, Lippincott, Reed and Bojert, J. J., also dissented. The dissenting Judges with Garrison, J., making a majority in favor of what the plaintiff in error here contends for.

"No principle of equitable jurisdiction is more firmly established than that relief will not be refused merely because the subject matter of the controversy is out of the jurisdiction, if the cause is in other respects a proper one for the application of such relief, for chancery acting in personam, and not in rem, holds the conscience of the parties bound without regard to the situs of the property." 2 W. and T. Lc. in Eq. 1824, 4th ed.

"It is a general rule in the construction of wills, that the last domicile of the testator is to be resorted to, in all questions of construction or interpretation. Where a will is made in one country, as to the meaning of the terms used, it is to be construed according to the laws of that country, whether the judicial inquiry as to its meaning and interpretation arise in that country or a foreign country." 3 Am. and Eng. Encyc. of Law 635-6. Title Conflict of Laws. "The law of the place of the actual domicile of the testator must govern in the construction and interpretation of a foreign will. Id. page 637. "Adjudications by foreign courts, being the domiciliary courts of the deceased testator, construing a will, will be binding upon courts elsewhere." Id. page 638. "The Court of the domicile is the forum concursus to which the legatees under a will are required to resort." 8 Am. and Eng. Encyc. of Law 415. Title Foreign Exors. and Admors. "Generally, the laws of the place under which an ancillary administration is taken out, govern the distribution of the assets in the payment of debts, but the distribution of the estate to the heirs and legatees is to be made according to the laws of the domicile of the testator at his death." Id. page 430. "In order to prevent great confusion in

the distribution of assets, the law of the domicile must be held the rule in the distribution, both in succession and bankruptcy." (Ibid note 1) "Where a will or testament of personal property is made in the place of the domicile of the testator, the general rule of the common law is that it is to be construed according to the law of the place of his domicile in which it is made." Story on Conflict of Laws Sec. 479 a. "The same rule of construction will generally apply to wills of immovable property unless it can be clearly gathered from the terms used in the will that testator had in view the law of the place of the situs, or used other language which necessarily referred to the usages and customs or language appropriate only to that situs. Id. Sec. 479h. "A will must be interpreted according to the law of the country where it is made, and where the party making the will has his domicile." Lord Lyndhurst in Trotter vs. Trotter, 4 Bligh. N. S. 502. 3 Wils. & Shaw. 407. "Wills are supposed to speak the sense of the testator according to the received laws and usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or contradicts such a conclusion." The opinion of the Court delivered by Story, J., in Harrison vs. Nixon, 9 Pet. 504. The leading English case is Trotter vs. Trotter, 4 Bligh. House of Lords N. S. 502. Lord Chancellor Lynhurst, where testator died domiciled in India and leaving a will. He owned real estate in Scotland where most of the estate was to be divided, and also personalty. The will was invalid under the laws of Scotland because defectively executed, and the realty went to the heir. ("The law of the place where the real or immovable property is locally situate is to govern as to the capacity or incapacity of the testator, the extent of his power to dispose of the property and the forms and solemnities to give the will its due attestation and effect." Story, Conflict of Laws Sec. 474. 2 Greef on Ev. Sec. 670. The province of the lex reisitae in governing the disposition of real estate by will applying to the capacity of the testator and the formalities of execution.) The question arose in a Scotch

Court as to whether the heir-at-law could take the real estate, and also claim his share under the will, without allowing the real estate to be reckoned with the personalty disposed of by the will, and the Court had to determine the intent of the will as to the Scotch realty. The question was simply one of construction. Held. "It was held most properly in the Court below, that the will was to be interpreted by the law of the land where it was made, and where testator had his domicile, namely, India, i. e. by the law of England; and also that although the will was the subject of judicial inquiry in the Courts of Scotland, the same rule was to be applied to the interpretation of it as if the will had been the subject of consideration and adjudication in the Courts of England. * * * A will must be interpreted according to the law of the country where it is made and where the party making the will has his domicile. There are certain rules of construction adopted in the Courts, and the expressions which are made use of in a will have frequently reference to those rules of construction, and it would be productive therefore of the most mischievous consequences, and in many instances defeat the intention of the testator, if those rules were to be altogether disregarded and the judges of a foreign Court without reference to that knowledge which it is desirable to obtain of the law of the country in which the will is made, were to interpret the will according to their own rules of construction." Pages 584, 587. The fact that the actual execution of the will was not in South Carolina but outside of it while on a visit to relatives, does not affect the proposition that the law of her domicile governs the interpretation and construction. Her domicile after her marriage was continuously in South Carolina where her husband had his domicile. Depuy vs. Wurtz, 53 N. Y. 556. Cauefield vs. Sullivan, 85 N. Y. 153. Harrison vs. Nixon, 9 Pet. 483, 504, 505. The ratification, affirmation and republication of it and the codicil itself were made in South Carolina. Miss Anstruther, a native of Scotland, came to reside in England and was domiciled in London thereafter up to the time of her death. During her

stay in Edinburg on one of those visits, she employed a writer to the signet in Edinburg to prepare her will. She executed it in Edinburg 16 December, 1814. The will was entirely in the Scotch form, and immediately upon its execution was deposited by her in the hands of the writer to the signet by whom it had been prepared, and remained in his hands, unaltered and unrevoked by her, until after her death in London, 1820. It was contended that the will being a Scotch instrument and containing technical phrases wholly unintelligible unless the Scotch law was applied to it, should be construed according to the Scotch law, but it was held that the law of the domicile of the testatrix, England, must prevail. Anstruther vs. Chalmers, 2 Simons 1 to 7. 2 Eng. Ch. Reports.

The note by Bigelow, Story Conflict of Laws p. 651 is: "The rule that a will is to be interpreted according to the law of the testator's domicile is not limited to dispositions of his personal estate, but seems to apply in all cases except where it appears that he expressed his meaning with reference to the laws of some other place. Trotter vs. Trotter, Ubi Supra. Wallis vs. Brightwell, 2 P. Wms. 88. Maxwell vs. Maxwell L. R. 4 H. L. 506. Cauefield vs. Sullivan, 85 N. Y., 153. Story's Conflict of Laws Sec. 479 a, h, m. For example, in cases where a will is inoperative as to real estate in a foreign country, and the question is whether the testator has expressed an intention to dispose of it, which will put the heir to his election, the interpretation is governed, not by the law of the foreign country where the real estate is, but by the law of the testator's domicile. Maxwell vs. Maxwell, 2 D. M. & G. 705. Orell vs. Orell L. R. 6 Ch. 302. Perhaps a specific disposition of real estate in a foreign country separately from other property may be presumed to have been made with reference to the law of that country, and may therefore be interpreted according to that law. See Yates vs. Thompson, 3 Cl. and F. 588. But no such presumption can arise where a testator makes a general disposition of all his property or all his real estate. In such a case the question being simply one of the intentions expressed in

the will, and not of the validity of the disposition, it is evident that the word expresses the same intention as to all the property or real estate wherever it may be. They ought not, therefore, to be intepreted even in the case of real estate, so as to have different meanings in the different countries where the lands may be." Crusoe vs. Butler, 36 Miss. 150. Wilson vs. Cox, 49 Miss 538, 545. Studd vs. Studd, Scotch Ct., Sess. Cas. 4th Series, vol. 8, p. 249. "In the interpretation of wills whether of movable or immovable property, where the object is merely to ascertain the meaning and intent of the testator, if the will is made at the place of his domicile, the general rule of the common law is, that it is to be interpreted by the law of that place at the time when the will was made. Thus, for example, if the question be, whether the terms of a foreign will include the "real estate" of the testator, or what he intended to give under those words; or whether he intended that the legatee should take an estate in fee or for life only; or who are the proper persons to take, under the words "heirs at law," or other designatio personarum, recourse is to be had to the law of the place where the will was made and the testator domiciled. And if the will is made in the place of his actual domicile, but he is in fact a native of another country; or if it is made in his native country, but in fact his actual domicile at the time is in another country; still it is to be interpreted by the law of the place of his actual domicile. The question whether, if the testator makes his will in one place, where he is domiciled, and afterwards acquires a new domicile in another country where he dies, the rule of intepretation is changed by his removal, so that if the terms have a different meaning in the two countries the law of the new domicile shall prevail, or whether the interpretation shall remain as it stood by the law of the domicile where the will was made, is a question which does not seem yet to have undergone any absolute and positive decision in the Courts acting under the common law." 2 Greenleaf on Evidence Sec. 671.

In case of doubt or difficulty as to his powers and duties the

executor or administrator may apply to a Court of Equity for instructions, or for a construction of the will, in order to avoid injustice to himself or injury to the estate. This jurisdiction long exercised is derived from the jurisdiction of Courts of Equity in cases of trust arising in the settlement of estates. 11 Am. and Eng. Enc. of Law, 2 Ed. 910. Treadwell vs. Cordis, 5 Gray 341. Horton vs. Cantwell, 108 N. Y. 255. "An administrator or executor has an unquestionable right, when he finds such difficulty in the administration of the estate as to render the administering of it unsafe, to bring the whole matter with all the parties interested therein to the view of the Court of Equity and ask its judgment for his guide." Brown vs. McDonald, 1 Hill. Ch. So. Ca. 300, 301. And so has a trustee. Perry on Trusts Sec. 928.

"As the executor is liable to account, so he may for his indemnity apply to the Court of Chancery to administer the estate amongst the parties interested." 1 Spense Eq. Jur. 583. "Jurisdiction of an action for the construction of a will is incidental to that over trusts, and exists where the Court is moved on behalf of an executor trustee or cestui que trust, and to insure a correct administration of the power conferred by a will." Bailey vs. Briggs, 6 Lans 356, 56, N. Y. 407. Wager vs. Wager, 89 N. Y. 161. Walnath vs. Handy, 24 How. Pr. 353. 1 Boone Code Pl. Sec. 212, p. 411.

"The incapacity to enforce the decree in rem. constitutes no objection to the suit." 1 Story Eq. Jr. Sec. 744.

"The general principle that the performance of equitable obligations will be enforced without regard to the situation of the property which they relate, is not confined to specific performance, but extends equally to all cases requiring its application where full relief can be administered by the decree." 2 W. and T. L. C. in Eq. p. 1825. Caldwell vs. Carrington, 9 Pet. 101. Ward vs. Arredondo Hop. Ch. 223.

Levy, a citizen of New York, died leaving a will duly admitted to record there. He owned an estate, real and personal, in New York; also Monticello, a farm in Virginia. By his will

he gave the residue of his estate including the real estate in Virginia, to the people of the United States in trust for the establishment and maintenance at Monticello of an agricultural school. If the United States declined to accept the trust, he gave the property on the same trusts to the State of Virginia. The qualified executors brought a suit in equity in New York to have the will construed, to which the State of Virginia did not appear. The New York Court declared this trust provision void. The heirs of Levy then brought suit in equity to have the Monticello estate sold and divided among them to which the State of Virginia was made a party. On appeal by the Commonwealth of Virginia from the decree of the Circuit Court of the State of Virginia ordering the sale of the land, the Court of Appeals of Virginia held thus: "The case was an eminently proper one for a suit by the executors and trustees to have the will construed, and the difficulties which attended its execution removed out of their way by a Court of competent jurisdiction. And it was eminently proper that such a suit should be brought in the Court in which it was brought to wit in the Supreme Court of the State of New York, for the city and county of New York. The testator's domicile was there at the time of his death and had been for a long time before there, "his will was recorded there," his executors qualified and resided there, almost all his heirs and next of kin resided there, and portion of his estate, real and personal, was located there. Why is not the decree of the Court of last resort in the State of New York, in the suit which was brought there, a final and conclusive decree upon the whole matter of the devise? It is not pretended that there was any fraud in the institution or prosecution of that suit, that it was not fairly argued and decided, that the trust attempted to be created by the will was not well represented and defended in the suit. That decree of the Court of last resort in New York must be final and conclusive not only as to the property in New York, but also as to the property in Virginia; unless it be true that the United States did not legally represent the trust

or that the Courts in New York had no jurisdiction of the subject so far as the real estate in Virginia is concerned. We think the United States did legally represent the trust. Cites McGregor vs. McGregor, 9 Iowa 65. Dickenson vs. Hoomes, 8 Gratt 353. Massey vs. Watts, 6 Cranch. 148, to the point that when the object of the suit is to enforce a trust arising ex contractu, or from any other source, the situation of the land will be immaterial, and that the jurisdiction will not fail as to lands out of the State from its becoming necessary to decide upon title to those lands. The subject of the devise is one and indivisible looking to its nature and its objects, and the Court could not well decide upon one part without deciding upon the other. The question as to the validity of the devise, in all its parts is res judicata. The New York Court undoubtedly had cognizance of the entire subject. The Court intended to make an end of the case and to pronounce such a decree as would protect the executors and trustees. The decree in the New York suit is conclusive upon Virginia, though she was not a party. Virginia vs. Levy et. al. 23 Grattan (Va.) 21 to 41. Sales, J., thought the State of Virginia was in no manner bound by the New York suit, but upon the other points concurred.

"Can the Court take jurisdiction of the mortgage on the real estate which is extra territorial? That the decree cannot operate as a conveyance of land out of the State, as it does under the statute within the State, is a matter which does not affect the jurisdiction. Having jurisdiction of the parties, the Court may decide the controversy between them, and effect may be given to the decree as the law shall authorize." McLean vs. Lafayette Bank, 3 McL. 622.

"Courts cannot sustain jurisdiction of naked questions of title to lands beyond the limits of the State; but the jurisdiction of Courts of Equity is sustainable, wherever the person of the defendant may be found, in cases of trusts, of fraud, and of contract, even though lands not within the geographical jurisdiction may be affected by the decree; and its decree will be regarded by other Courts as conclusive, until reversed or an-

nulled." McGregor vs. McGregor, 9 Iowa 65. Such has been the law certainly since the case of Angus vs. Angus, West Rpts. Temp. Hardwick 23.

"It seems to be the better opinion that the law of the domicile of the testator will govern as to what shall be regarded as personal estate, and what real, and the intimation of Jarman to the contrary has not been acquiesced in by the profession, nor by the Courts." 1 Redfield on Wills, Ch. IX, Sec. 15, p. 405.

The Supreme Court of Errors of Connecticut says in Mullen vs. Reed, 64 Conn. 247: "The question of course is what was intended by these words at the time they were put into this certificate of membership; and this is to be ascertained from the words used to express the intention, when read in the light of all the circumstances under which they were used. In ascertaining their meaning it must be borne in mind that the contract embodied in the certificate was made in Massachusetts, by parties domiciled or located there; that it was undoubtedly made with reference to the law of that State alone; and that both by its terms and by the understanding of the parties, it was to be performed there. This being so, the general rule is that it should be construed and interpreted according to the laws of that State. The principle laid down in Staigg vs. Atkinson, 144 Mass. 564 we think equally applicable to an instrument like this. "For purposes of construction, it is always legitimate to consider the time when and the circumstances in which the will was made, and we think the law under which it is made is one of those circumstances." Muller vs. Reed, 64 Conn. 247. "Testator sought to provide for the distribution of his American funds among his American relatives through an American administration, and of his English estate among his English relatives through an English administration. Plaintiff sues as an American executor and trustee for a construction of the will. * * * Plaintiff was not entitled to seek the advice or direction of the Superior Court, except so far as might be necessary for his protection in the administration of his tes-

tamentary trust. The will from which he derives his appointment is that of an Englishman, and receives its force and effect, so far as concerns the property in question from English law. (Russell vs. Hooker, 67 Conn. 24.) While providing for two administrations, it is a single and entire document, and purports to dispose of the testator's whole estate. It cannot have two meanings, one in England and another in Connecticut. If the residuary bequest to the English trustees is broad enough by English law to cover a lapsed legacy of American funds, that effect will be accorded to it in American courts, for the simple reason that such was the intent of the testator; his intent being necessarily that which is attributable by the laws of his domicile to the words which he has used." Harrison vs. Nixon, 9 Pet. 488, 502. Mullen vs. Reed, 64 Conn. 240, 247. Rockwell, Exor. and Trustee, vs. Bradshaw et al., 67 Conn. 14.

"The next objection urged against the decree of the Court below is, that it is void so far as it directed the usual foreclosure and sale of real property not within the territorial jurisdiction of the Court. A part of the Chicago and South Western Railway is in the State of Missouri, and the mortgage which the bill sought to have foreclosed covered that part, as well as the part in the State of Iowa. The court decreed a sale of the entire property covered by the mortgage, and directed the Master who was ordered to make the sale, to execute a good and sufficient deed or deeds to the purchaser. * * Before we can set aside the decree which was made, it ought to be made clearly to appear beyond the power of the Court. Without reference to the English Chancery decisions, where this objection to the decree would be quite untenable, we think the power of Courts of Chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a Court of equity, sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True it cannot send its process into that other State, nor can it deliver possession of land in another

jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants. In McElrath vs. The Pittsburgh and Steubenville Rail Road Co., 55 Penn. St. 189, a bill for foreclosure of a mortgage—in which it appeared, that a railroad company whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the Court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the State of West Virginia, as that in Pennsylvania. This case is directly in point. The mortgagors here were within the jurisdiction of the Court. So were the trustees of the mortgage. The Court might have ordered the trustees to make the sale. We cannot declare void the decree which has been made." Muller vs.Dows, 94 U. S. 448-450.

Perkins in his note dissents from the doctrine of Jarman as to the law of what place governs the interpretation and construction of wills, and accords in opinion with what plaintiff in error here contends for, that the law of the domicile governs, and in addition to Story, Greenleaf and Lord Eldon, already cited, cites 2 Burge Comm. Col. and For. Law 857, 858. 1 Jarman on Wills, 1; note 2 Amer. ed.

"As the controversy is over the construction of a South Carolina will, it should be construed by the decisions of the Courts of that State. If from the decisions in South Carolina we can say how the will would be construed, if brought under review there, it is our duty to adopt that construction, regardless of what our opinion would be of the instrument as a Mississippi will. Neither in the Newell case, 9 Sm. and Marshall 56, nor in this, is the inquiry what the law is, but what the law is as declared by the South Carolina courts. Whether we do or do not concur in the law as announced in South Carolina is wholly immaterial. If we can certainly know how the courts there have construed, we should follow such construction, even

though it be opposed to the opinion of this Court." Adams vs. Farley, 18 So. Rpr. 391. (Miss.)

The subject matter was the interpretation and construction of the will; and the object of interpretation and construction of the will was to ascertain the intention of the testatrix as in her will expressed. It is patent from her words that her disposition of the residuary property was one—uniform and indivisible, applicable to all of it everywhere, and it would be absurd to say that her words are to be taken in as many different senses as there are States in which she happened to have property. Her intention expressed in the instrument was the object of inquiry, for it is as often called "the law of the instrument." King vs. Melling, 1 Vent. 231; "the pole star," Doedem Long vs. Laming, 2 Burr. 1112; "the sovereign guide," Doedem Dodson vs. Grow, 2 Wils. 322. Independent of authority and decided cases, what court is so competent a priori to place itself as required "in the situation of the testator who made it." Wigram on Wills, Pl. 76, as the court of the domicile? What court so competent advisedly to weigh the hearing and effect of the testimony relating to the posture and condition of testator and his estate? Pell vs. Ball, Speer Eq. 66-80. Rosborough vs. Hemphill, 5 Rich. Eq. 105. Laurens vs. Read, 14 Rich. Eq. 268-269 and "the situation of and circumstances by which at the time of expressing himself, the testator is surrounded, for his words, like those of every other person, tacitly refer to those circumstances?" Wigram on Wills, Pl. 76. Minor vs. Ferris, 22 Conn. 371-377.

"Jurisdiction is the power to hear and determine a cause and it is coram judice whenever a cause is presented which brings this power into action." Ward vs. Arredondo, 6 Pet. 710.

The judgment in the South Carolina case is binding upon the parties in the case at bar. In the two cases Circuit Court of Maryland of Horatio L. Whitridge, assignee of William H. Brune, vs. the Mutual Life Ins. Co. of New York, on two policies issued by it in the name of said Brune, on the life of John S. Barry. Held, that a decree in the case Rosalie C. Barry,

widow of John S. Barry, in
vs. the Mutual Life Ins. C
ridge, assignee of William
of the claim of not only
Whitridge, assignee of Br
ance company, of all of the
claim against the compa
When this decree was rend
surance Co. vs. Harris, 97
yee, 7 Crauch. 481, Mayhe
bich vs. Folger, 20 Wall.
474. Dobson vs. Pierce, 1

The rule of the construc
tended for "is in fact nothi
rule by which the lex loci
tions of construction, and i
that a testator may well s
the sense which it has ac
where he is domiciled." B

, in the Supreme Court of New York
. Co. of N. Y. and Horatio L. Whit-
m H. Brune was a final determination
y Mrs. Barry and Brune, but also of
Brune, in the two cases vs. the insur-
them upon the policies in suit, and the
ipany no longer open to litigation.
endered it closed the controversy. In-
97 U. S. 331-336, citing Mills vs. Dun-
yhew vs. Thatcher, 6 Wheat 129, Ha-
ll. 1, Burnley vs. Stephenson, 24 Ohio
, 12 N. Y., 156.

truction of the Court of domicile con-
thing more than a branch of the larger
oci contractus is held to govern ques-
d it rests upon the common sense view
l suppose that his language is to bear
according to the law of the country
Boyes vs. Bedale, 1 Hem. and M. 805.

LeROY F. YOUMANS,
for Plaintiff in error.